United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

77-7209

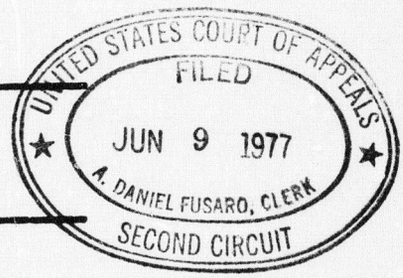
United States Court of Appeals
For the Second Circuit

IRVING ELLENTUCK et al.,
Plaintiffs-Appellants,

-against-

JOSEPH B. KLEIN et al.,
Defendants-Appellees.

On Appeal from a Judgment of the
District Court, Southern District of New York



Joint Appendix

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PAGINATION AS IN ORIGINAL COPY

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DATE	NR.	PROCEEDINGS
06-22-76	1.	FILED COMPLAINT, ISSUED SUMMONS.
06-21-76	2.	Filed summons with marshals return. SERVED: JUSTICE J. P. COHALAN, 6-28-76 " " JUSTICE [illegible] 6-28-76 " " JUSTICE H.J. LATHAM 6-28-76 " " JUSTICE VITO J. TITONE 6-28-76 " " JUSTICE SAMUEL J. LAZIN 6-28-76 " " RICHMOND HILL SAVINGS BANK 6-29-76 " " JULIUS GRANIER 6-29-76 " "KIMBALL CONST. CO. ON 6-29-76 " " [illegible] 6-29-76 " " JOHN KIMBALL on 6-29-76. " " COMMISSIONER HILIP ACOSTA 7-2-76 " " COMM JOHN B. WALSH. 7-2-76 " " COMM HENRY M. CARROLL 7-2-76 " " COMM. JOSEPH BL KLEIN 7-2-76. UNABLE TO SERVE Joseph Stein. " " " :HELEN KARLSEN SERVED IRVING SICHAN 7-8-76 " COMM. JEREMIAH T. WALSH. 7-14-76.
08-02-76	3.	Filed stip & order that the time of defts named may answer etc, is extended to 9-10-76, Pierce, J.
09-02-76	4.	Filed Pltffs Amended complaint.
09-13-76	5.	Filed Affidavit & Notice of Motion by deft Kimball for a judgment dismissing the amended complaint, etc, rtble on 10-13-76.
09-13-76	6.	Filed memorandum in support of deft Kimball's motion to dismiss.
09-14-76	7.	Filed Affidavit & Notice of motion of deft City of New York for an order dismissing all or parts of the amended complaint, etc, rtble on 10-13-76.
09-14-76	8.	Filed memorandum of law by deft City of New York in support of said motion.
09-15-76	9.	Filed amended and supplemental summons with Marshals return. SERVED JUDGE ALFRED D. LERNER on 9-7-76. (for an order to)
09-21-76	10.	Filed defts Notice of motion to dismiss the emended complaint, etc, rtble on 10-13-76.
09-21-76	11.	Filed defts memorandum of law as indicated.
09-24-76	12.	Filed Noticeof Motion by defts Richmond Hill Savings Bank and J. Granier for an order dismissing the complaint herein, etc, rtble on 10-13-76.
10-13-76	13.	Filed Order that the various motion s in the above action are adjourned to 11-8-76, Pierce, J.
10-29-76	14.	Filed pltffs amended complaint.
10-29-76	15.	Filed pltff memorandum in support of motion for summary judgment.
10-29-76	16.	Filed pltffs motion for summary judgment as indicated.
11-4-76	17.	Filed Marshals return SERVED COMM. JOHN B. WALSH on 10-26-76.
11-18-76	18.	Filed stip & orderthat the pltffs motion for complaete and or partial summary judgment aginst the defts herein, is extended to 12-8-76 and further stipulated that the motions of defts named are further adjourned to 12-8-76 etc, as indicated, Pierce, J.
12-1-76	19.	Filed Answering affidavit of Julius Granirer dtd 11-23-76 as indicated.
12-1-76	20.	Filed defts R Hill SB memorandum in opposition to pltffs motion for summary judgment as indicated.
12-3-76	21.	Filed Affidavit of deft Corp Counsel of th City of N.Y. in response to the affidavit of pltffs attorney, etc, as indicated.
12-7-76	22	Filed pltffs reply affidavit.
12-7-76	23	Filed affidavit in opposition to application by defts.
12-7-76	24	Filed memo fo pltff in opposition to applicaton by defts.

Cont'd on Page 3

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 76-2[illegible]
IRVING ELLENTUCK, ET.AL.	JOSEPH B. KLEIN, ET.AL	PAGE 3 OF ___ PAGE

DATE	NR.	PROCEEDINGS
		PIERCE,J.
3-31-77	25.	Filed Opinion #45751 The defts' motions to dismiss the amended complaint in its intirety are gereby granted. The amended complaint is hereby dismissed with prejudice and with costs...So Ordered.... PIERCE, J. m/n
4-4-77	26	Filed Judgment It is ordered, adjudged and decreed that defts. Joseph B. Klein, Et. Al. have judgment against pltffs. Irving Ellentuck, et al, dismissing the amended complaint in its entirety with prejudice and with costs to be taxed....CLERK. m/n
4-26-77	27.	Filed Pltffs. notice of appeal to the U.S.C.A. 2nd Circuit from the final judgment dated and entered in this action on 4-4-77 dismissing Pltff's amended complaint. Mailed all copies on 4-27-77.
4-26-77	28.	Filed Pltffs. appeal bond in the sum of $250.00 Fidelity & Deposit Co..
5-5-77	29	Filed pltffs designation of exhibits, to USCA.
5-12-77	20.	Filed notice on transfer of records to the USCA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -

IRVING ELLENTUCK and MILDRED ELLENTUCK, MARK R. BRYCE and ROBERTA BRYCE, A. GERARD HYDE, SAUL NOVAK and PHYLLIS NOVAK, LEONARD SAVINO and KEVIN P. WILKINSON and MARGARET WILKINSON, on their own behalf and on behalf of other adjoining property owners who objected to and object to the granting of a variance to the subject premises permitting a Class A multiple dwelling therein, and all others similarly situated,

Plaintiffs,

- against -

JOSEPH B. KLEIN, PHILIP AGUSTA, HOWARD B. HORNSTEIN, HENRY M. CARROLL and JOHN P. WALSH as Commissioners constituting the BOARD OF STANDARDS AND APPEALS of the CITY OF NEW YORK, PHILIP AGUSTA, HENRY M. CARROLL and JOHN B. WALSH individually, JEREMIAH T. WALSH as Commissioner of Buildings of the City of New Uork, H. IRVING SIGMAN as Borough Superintendent of the Borough of Queens and individually, ERLING KARLSEN as Inspector of the Department of Buildings of the City of New York and individually, JOSEPH STEIN as former Commissioner of Buildings of the City of New York, KIMBALL CONSTRUCTION CO. INC., JOHN KIMBALL and MARIE A. KIMBALLas officers and directors of the Kimball Construction Co. Inc., and individually, RICHMOND HILL SAVINGS BANK, JULIUS GRANIRER, the HONORABLES M. HENRY MARTUSCELLO, HENRY J. LATHAM, JOHN P. COHALAN, Jr., SAMUEL RABIN and VITO J. TITONE, as Justices of the Supreme Court of the State of New York, APPELLATE DIVISION, SECOND DEPARTMENT and the HONORABLE ALFRED D. LERNER as Judge of the Supreme Court of the state of New York, County of Queens,

Defendants.
- -

PLAINTIFFS DEMAND A TRIAL BY JURY

Index # 76C2732

Judge Pierce

AMENDED COMPLAINT

Plaintiffs, complaining of the defendants, by DORA ABERLIN, their attorney, respectfully show this Court and allege:

AS AND FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANTS, KIMBALL CONSTRUCTION CO. INC., JOHN KIMBALL, MARIE A. KIMBALL, JOSEPH STEIN, as COMMISSIONER OF BUILDINGS OF THE CITY OF NEW YORK, H. IRVING SIGMAN, as BOROUGH SUPERINTENDENT and INDIVIDUALLY, and ERLING KARLSEN as INSPECTOR FOR THE DEPARTMENT OF BUILDINGS and INDIVIDUALLY

1. This cause of action arises under and is justified by the Constitution of the United States, Amendments V and XIV, the Acts of Congress providing for equal rights for all, the Multiple Dwelling Law of the State of New York, the Charter and the Administrative Code of the City of New York and the Zoning Resolution of the City of New York, effective December, 1961, and the Judiciary Law of the State of New York.

2. Jurisdiction to adjudicate this cause of action is conferred upon this Court by Title 28, U.S.C.A. Secs. 1343, 2201 and 2202, and Title 42 U.S.C.A. Secs. 1983 and 1985.

3. That the amount in controversy exceeds the sum of $10,000. exclusive of interest and costs.

4. This cause of action involves the rights of persons to equal protection of the laws, to due process and to the possession, use and enjoyment of real property and their rights to protect such property in accordance with the laws duly made and enacted therefore, and their rights to recover damages for conspiracy to deprive them and the deprivation of their rights to equal protection of the laws, and their deprivation under color of state law of the rights, privileges and immunities guaranteed them under the Constitution of the United States and the Acts of Congress providing equal rights for all.

5. This action involves the unlawful granting of a

building permit to the Kimball Construction Co. Inc., by the Building Department of the City of New York for premises at and known as 131-16 Rockaway Beach Boulevard in the Borough and County of Queens, City and State of New York, to alter said premises, a wooden frame building in an R-2 Zone under the applicable zoning law, to a multiple class A dwelling in violation of the Multiple Dwelling Law of the State of New York and the Zoning Resolution of the City of New York and in violation of the rights of the plaintiffs under the Constitution of the United States of America and the Acts of Congress to the equal protection of the laws and to due process.

6. This action is brought by plaintiffs for themselves as the owners of property adjacent to the subject premises for which said illegal permit was granted, and for other adjacent property owners who had and have the right to object to the granting of said permitby the Building Department of the City of New York, of whom there are too many to name individually, and for all others similarly situated, of whom there are and will be countless numbers whom it is neither practical nor feasible nor possible to bring before this Court, but there are questions of law and common relief sought herein for an entire class and plaintiffs are fairly representative of the entire class.

7. That the defendant, JOSEPH STEIN, was at some of the times hereinafter mentioned, formerly the Commissioner of Buildings of the City of New York.

8. That the defendant, JEREMIAH T. WALSH, at other times hereinafter mentioned, was , and on information and belief, still is the Commissioner of Buildings of the City of New York, succeeding the former Commissioner, Joseph Stein.

9. That the defendant, H. IRVING SIGMAN, at all the times hereinafter mentioned, was, and on information and belief, still is the Borough Superintendent for the Department of Buildings for the Borough of Queens, City of New York.

10. That at all the times hereinafter mentioned, the defendant, ERLING KARLSEN, was an inspector for the Department of Buildings, Borough of Queens, in charge of inspecting and reporting on the proposed alteration of the subject premises to a Class A multiple dwelling.

11. That at all the times hereinafter mentioned, the defendant, KIMBALL CONSTRUCTION CO. INC., was and still is a domestic corporation, duly organized and existing under the laws of the State of New York.

12. That at all the times hereinafter mentioned, the defendants, JOHN KIMBALL and MARIE A. KIMBALL were and still are, on information and belief, officers and directors of the Kimball Construction Co. Inc., and the sole stockholders therein.

13. That at all the times hereinafter mentioned, the defendant, Kimball Construction Co. Inc., was and still is the owner of record of the premises at and known as 131-16 Rockaway Beach Boulevard, Borough and County of Queens, City and State of New York.

14. That said premises known as 131-16 Rockaway Beach Boulevard, Queens, New York, is a three story and basement wooden frame building, constructed on information and belief, on or about 1908 as a single family dwelling in a zone limited at that time to such use.

15. That on information and belief, the defendant, Kimball Construction Co. Inc., purchased the subject premises known as 131-16 Rockaway Beach Boulevard, Queens, New York, on or shortly before June 30, 1972.

16. That the prior owner transferring title to said premises to the Kimball Construction Co. Inc., was the SISTERS OF REPARATION OF THE CONGREGATION OF MARY, INC., a charitable religious membership corporation.

17. That prior to said transfer to the Kimball Construction Co. Inc., the Sisters had used and operated the subject premises for a period of upwards of twenty years , as a convent, and on a charitable non-profit basis, primarily as a home for homeless and/or aged women.

18. That the district wherein said subject premises are located is an R-2 district zoned for single family detached dwellings only and for certain community uses as shown on Zoning Map (30b) attached to the Zoning Resolution of the City of New York effective December 15, 1961.

19. That pursuant to the provisions of said Zoning Resolution , such use by the Sisters of the subject premises as a convent and on a charitable non-profit basis , primarily as a home for homeless and/or aged women, was and is a permissible conforming use under the said Zoning law.

20. That the use by the Sisters of said premises for a conforming usage for such period of time pursuant to the provisions of the Zoning Resolution, thereafter barred the use of said premises for a non-conforming use.

21. That under the provisions of the said Zoning Law

a convent and/or a charitable institution permitted under said provisions, is considered equivalent to a one family dwelling.

22. That when the Sisters operated said subject premises for a period of upwards of twenty years as a convent and on a charitable non-profit basis primarily as a home for homeless and/or aged women, they abandoned any right the premises might have had to be used for a non-conforming usage.

23. That the premises could thereafter be used by the Sisters or their successors in interest only for a conforming usage under the Zoning Law.

24. That the construction and/or alteration of a conforming building to a non-conforming usage was and is absolutely forbidden under the Zoning Law.

25. That the construction and/or alteration of a non-conforming building to another non-conforming usage which is undesireable and/or out of keeping with the character of the neighborhood was and is also forbidden under the Zoning Law.

26. That under the provisions of the Zoning Law, no multiple dwelling may be constructed , or any conforming building altered to a multiple dwelling in an R-2 district.

27. That the defendants, Kimball Construction Co. Inc., by its officers and directors, and John Kimball and Marie A. Kimball, when they purchased the said subject premises, knew that the same could not be used for any but a conforming usage under the zoning law and that the alteration of said premises to a multiple dwelling was a violation of law.

28. That under the law, adjacent property owners have

a property right to the benefit of the provisions of a zoning law to protect their respective properties from immediate and future depreciation and from immediate and future deterioration of their neighborhood.

29. That the defendant, Kimball Construction Co. Inc., by its officers and directors, and the defendants, John Kimball and Marie A. Kimball, individually, on information and belief,upon the purchase of said subject premises or shortly before or thereafter, entered into a purposeful scheme and conspiracy, and conspired together with the defendants, Erling Karlsen and H. Irving Sigman for the express purpose of depriving plaintiffs and others owning property adjoining or adjacent to thesubject premises owned by the Kimball Construction Co. Inc., of the equal protection of the laws, particularly of the provisions of applicable Zoning Law of the City of New York and the provisions of the Multiple Dwelling Law of the State of New York, and of their equal prvileges and immunities under the laws and to hinder and prevent the duly constituted authorities from giving and securing to plaintiffs and other adjacent property owners the equal protection of the laws, and under color of state law to deprive plaintiffs and the other adjpining landowners of their rights, privileges and immunities secured them by the Constitution of the United States and the laws passed by Congress.

30. That the express purpose of the aforesaid conspiracy was to deprive and did deprive plaintiffs and other adjoining landowners of their right to equal protection under the laws, to violate and did violate the Zoning Law of the City of New York and the Multiple Dwelling Law of the State of New York, and to discriminate

and did discriminate in favor of the defendant, Kimball Construction Co. Inc., to protect and favor its interests by enabling and permitting it to convert the subject premises to a highly profitable use as a Class A multiple dwelling, a use denied and forbidden to plaintiffs and other adjoining landowners for their properties both by the Zoning Law and the Multiple dwelling Law, and a use highly detrimental to their interests and the value of their properties.

31. That in furtherance of said conspiracy, the said defendants engaged in many wrongful acts to the prejudice and damage to the plaintffs and other adjoining landowners.

32. That on or about June 30, 1972, or shortly thereafter the defendant, Kimball Construction Co. Inc., by its president, John Kimball, filed plans and specifications and amended plans and specificatio with the Department of Buildings of the City of New York, County of Queens, to obtain a permit to alter the subject premises to a Class A multiple dwelling containing 14 apartments and one for a superintendent, in accordance with said plans.

33. That the defendant, Erling Karlsen, as inspector for the Department of Buildings for the Borough of Queens, thereafter wrongfully approved said plans and caused to be wrongfully issued to the defendant, Kimball Construction Co. Inc., on or about November 8, 1972, a permit No. 4665 for alteration #688/72 for the wrongful conversion of said subject building to a Class A multiple dwelling in accordance with said plans.

34. That the said permit was utterly illegal and void under the Zoning Law.

35. That, on information and belief, the defendants, Kimball Construction Co. Inc., John Kimball and Marie A. Kimball and Erling Karlsen knew that said permit was illegal and void.

36. That on information and belief, the defendants, Kimball Construction Co. Inc., and John Kimball started construction on the alteration pursuant to said plans even prior to the issuance of said illegal permit.

37. That on infromation and belief, the said construction prior to the issuance of the illegal permit was started and continued with the knowledge and consent of the defendant, Erling Karlsen.

38. That shortly after said illegal permit was issued, a number of the adjoining landowners protested the issuance thereof to the defendant, H. Irving Sigman, Borough Superintendent of Buildings for the Borough of Queens and to the defendant, Joseph Stein, Commissioner of Buildings of the City of New York.

39. That on or about December 8, 1972, defendant, H. Irving Sigman, in an interdepartmental memorandum to Commissioner Stein, stated and conceded that the subject alteration was an undesireable one and out of keeping with the character of the neighborhood.

40. That in spite of said statement , admission and finding, the defendants, H.Irving Sigman and Joseph Stein refused to revoke the illegal permit and permitted the construction on the illegal alteration to continue.

41. That after the refusal of the defendants, Sigman and Stein, to revoke the illegal permit, a number of the adjoining landowners instituted an action in the Supreme Court of the State of New York, County of Queens, under Index # 15207/1972 to have

said permit and alteration declared illegal, to have the permit revoked and to restrain and enjoin the defendant, Kimball Construction Co..Inc., both permanently and pending the litigation from altering the subject premises to a Class A multiple dwelling pursuant to said permit or any permit.

42. That said action was brought for relief on two grounds.

43. That the first ground is set forth in paragraphs numbered 35 through 38 of that complaint to the effect that the permit was illegal in that it had been granted for an illegal conversion of a conforming building to a non-conforming usage in violation of the zoning law, in that any prior right to the use of said building for a non-conforming use had been abandoned by the Sisters for a period of upwards of twenty years and had been forever lost.

44. The second ground is set forth in paragraphs numbered 47 through 52 of the complaint in that action, to the effect that, even if the building were held not to have lost its right to a non-conforming status, the permit was illegal under the provisions of the Zoning Law in that the alteration was undesireable and not in keeping with the character of the neighborhood and therefore forbidden.

45. That immediately upon instituting said action as aforesaid, plaintiffs therein applied for a temporary restraining order to stop the continuance of construction under the illegal permit

46. That said application for a temporary restraining order was strenuously opposed by defendant, Kimball Construction Co. Inc. and was denied.

47. That thereafter the defendants, Kimball Construction Co. Inc., John Kimball and Marie A. Kimball continued the construction of said illegal alteration under said illegal permit.

48. That thereafter and in February, 1973, defendants Kimball Construction Co. Inc and John Kimball and Marie A. Kimball began installing tenants in said subject premises.

49. That the installation of said tenants was illegal in that no certificate of occupancy had as yet been issued for the premises.

50. That the issues in the aforesaid action were tried in Queens County Supreme Court on February 21, 22 and 23 1973 by the Court without a jury.

51. That decision was rendered in that action by the Court on June 18, 1973 in favor of the defendants, dismissing the complaint.

52. That judgment dismissing the complaint in that action was entered in the office of the Clerk of the County of Queens on July 2, 1973.

53. That the plaintiffs thereafter appealed from that judgment to the Appellate Division of the Supreme Court of the State of New York, Second department.

54. That on April 29, 1974 a unanimous decision and order of reversal was rendered by the said Appellate Division, Second department in that action.

55. That the said Appellate Division, Second Department, in rendering said decision of reversal, made , inter alia, the following findings of fact:

"However, we find the evidence overwhelming, (e.g.,Sisters' testimony, tax exemptions, combustible permit fee exemption, 1968-1969 telephone directory, other documents etc.) that from approximately 1951 to 1972 the Sisters operated the premises as a convent and, on a charitable non-profit basis as a home for homeless and/or aged women. This usage is a conforming usage under R-2 classification (detached residences) imposed by the zoning ordinance resolution that became effective in December 1961. In June 1972, defendant Kimball acquired the premises and thereafter obtained a permit to alter them into a Class A multiple dwelling with 14 apartments plus an apartment for a superintendent. Although conversion from one non-conforming use to another non-conforming use was authorized by law, we find that the evidence clearly established that the Class B classification was clearly abandoned by the Sisters' conforming usage from 1952 until the 1972 transfer to Kimball, and that in any event, in view of the character of the neighborhood, the nature of the conversion and the dismal assessment of the conversion by Borough Superintendent Sigman of the Department of Buildings of the City of New York, on December 8, 1972, the 1972 alteration permit permitting the conversion should not have been granted."

56. The order of the Appellate Division entered on the above decision, permanently enjoined the alteration to a Class A multiple dwelling as follows:

" Ordered and Adjudged that the permit is null and void and that the proposed alteration is illegal; the permit is vacated and the defendant, Kimball Construction Co. Inc., is permanently enjoined from further construction under the permit and from altering the premises to a Class A multiple dwelling. "

57. That during the pendency of all the aforesaid litigation and the appeal to the Appellate Division, the defendants Kimball Construction Co. Inc., John Kimball and Marie A. Kimball had continued and completed construction of the illegal alteration under the illegal permit, and had rented and installed tenants in the premises.

58. That on or about March 13, 1974, despite the pendency of the appeal to which he had been a party, the defendant, H. Irving Sigman, as Borough Superintendent in charge thereof, had caused

to be issued to the defendant, Kimball Construction Co. Inc., a certificate of occupancy for the subject premises as a Class A multiple dwelling.

59. That thereafter, in a departmental memorandum dated May 17, 1974, Commissioner Jeremiah T. Walsh who had succeeded Commissioner Stein, directed Borough Superintendent H. Irving Sigman to apply to the Board of Standards and Appeals for revocation of the illegal certificate of occupancy.

60. That thereafter, on information and belief, defendant H. Irving Sigman deliberately and willfully delayed making such application.

61. That on or about ~~July~~ June 11, 1974, defendant Sigman made the application to the Board of Standards and Appeals for revocation of the said certificate of occupancy.

62. That thereafter the application for revocation was set for hearing by the Board of Standards and Appeals under Calendar #367-74-A.

63. That without any justification therefore, and on information and belief, still in furtherance of the aforesaid conspiracy to favor and protect the interests of defendant Kimball Construction Co. Inc., the defendant, H. Irving Sigman, requested and obtained an adjournment of the hearing on revocation of the certificate of occupancy for several months over the summer period.

64. That the defendant Kimball Construction Co. Inc., strenuously opposed the revocation of the certificate of occupancy on the ground of hardship and practical difficulty in that it claimed to have spent a large amount of money for the alteration.

65. That thereafter and on or about October 1, 1974

the said certificate of occupancy was revoked by the Board of Standards and Appeals.

66. That despite the revocation of the certificate of occupancy, the defendants, Kimball Construction Co. Inc., John Kimball and Marie A. Kimball continued to permit the illegal occupancy of said premises by numerous tenants and continued to collect rents therefor.

67. That on or about October 4, 1974, a violation was filed against the subject premises for occupancy thereof without a certificate of occupancy, and the defendants, Kimball Construction Co. Inc. and John Kimball were directed to vacate said premises.

68. That on information and belief, still in furtherance of the conspiracy to prefer and favor and protect the interests of the defendants, Kimball Construction Co. Inc., John Kimball and Marie A. Kimball, and to deny and deprive plaintiffs and other adjoining landowners of their rights to equal protection of the laws, the Building department took no further steps, on information and belief, to enforce the order to vacate and the tenants continued to occupy and still continue to occupy said premises.

69. That the actions of the defendants aforesaid were all done in furtherance of the conspiracy and/were calculated to and did deprive , impede and defeat plaintiffs and other adjoining landowners of the equal protection of the laws and their rights under the Constitution of the United States.

70. That the actions of the defendants, in obtaining and/or causing to be issued an illegal permit in violation of law as aforesaid , in furtherance of said conspiracy, forced upon

plaintiffs the litigation hereinabove and hereinafter set forth and enabled the defendants, Kimball Construction Co. Inc. and John Kimball and Marie A. Kimball to obtain time to continue and complete construction under the illegal permit before the decision by the Appellate Division could be rendered and to create and establish an allleged basis for a subsequent application for a variance on the alleged ground of hardship and practical difficulty as will be hereinafter set forth,

71. That by reason of said conspiracy and the acts of the defendants in furtherance thereof, plaintiffs in an effort to protect their rights were forced to engage in and expend large sums of money for continued and continuous litigation, and did suffer and are suffering deprivation of their rights to equal protection of the laws and under the Constitution of the United States and did suffer and are still suffering great depreciation in the value of their properties and the deterioration of their neighborhood, all to their damage and the damage of all other adjoining property owners.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST THE DEFENDANTS, PHILIP AGUSTA, HENRY M. CARROLL and JOHN B. WALSH, individually, RICHMOND HILL SAVINGS BANK, JULIUS GRANIRER, KIMBALL CONSTRUCTION CO. INC., JOHN KIMBALL and MARIE A. KIMBALL.

72. Plaintiffs repeat and reallege each and every allegation hereinabove set forth in paragraphs numbered "1" through "71" of this complaint, with the same force and effect as though more specifically herein set forth.

73. That at all the times hereinafter mentioned,

JOSEPH B. KLEIN, PHILIP AGUSTA, HOWARD B. HORNSTEIN, HENRY M. CARROLL and JOHN B. WALSH were the commissioners constituting the Board of Standards and Appeals of the City of New York.

74. That the defendant, Kimball Construction Co. Inc., on information and belief, purchased the subject premises subject to a purchase money first mortgage in the sum of $46,000.

75. That the defendant, RICHMOND HILL SAVINGS BANK, was the lending institution which loaned the defendant, Kimball Construction Co. Inc., the said purchase money in the sum of $46,000.

76. That on information and belief, the said defendant, Richmond Hill Savings Bank, was and still is the owner and holder of record of the purchase money first mortgage on the subject premises given to secure the aforesaid loan of $46,000.

77. That on information and belief, the defendant, JULIUS GRANIRER, at all the times hereinafter mentioned, was and still is one of the attorneys for the Richmond Hill Savings Bank.

78. That at all the times hereinafter mentioned, on information and belief, the defendant, Julius Granirer was and still is a trustee of the Richmond Hill Savings Bank.

79. That on information and belief, the defendant, aforesaid Julius Granirer was the attorney who recommended the loan/to the Richmond Hill Savings Bank and who drew the bond and mortgage for said loan in the sum of $46,000. on behalf of said defendant bank.

80. That on information and belief, the defendant, Julius Granirer was the attorney who represented the Richmond Hill Savings Bank at the closing for the purchase of said premises by the defendant, Kimball Construction Co. Inc., and the execution

of the said bond and mortgage.

81. That on information and belief, the defendant, Julius Granirer was also the attorney who represented the defendant Kimball Construction Co. Inc., for the purchase of said premises both on the contract and closing therefore.

82. That on information and belief, the defendant, Julius Granirer ordered and examined the title search for the subject premises on behalf of the mortgagee bank, the defendant, Richmond Hill Savings Bank.

83. That on information and belief, the defendant, Julius Granirer, ordered and examined the title search for the subject premises on behalf of the purchaser mortgagor, the Kimball Construction Co. Inc.

84. That the Multiple Dwelling Law of the State of New York, since on or about 1929, regardless of any zoning regulation, forbids the erection or construction or alteration of a wooden frame building so as to permit occupancy thereof by more than 2 families, unless there exists a prior vested right in the premises to a continuance of the use of such premises as a multiple dwelling.

85. That the defendants, Julius Granirer, KImball Construction Co. Inc., John Kimball and Marie A. Kimball, knew when th premises were purchased that the said premises could only be used and operated for a conforming usage under the zoning law as a single family dwelling or under the Multiple Dwelling Law for no more than two families.

86. That immediately after the revocation of the

certificate of occupancy for the subject premises on October 1, 1974 by the Board of Standards and Appeals, the defendants, Kimball Construction Co. Inc., John Kimball, Marie A. Kimball, Julius Granirer, the Richmond Hill Savings Bank, Philip Agusta, Henry M. Carroll and John B. Walsh as Commissioners of the Board of Standards and Appeals and individually, on information and belief, entered into a purposeful scheme and conspiracy and conspired together at various times and places to violate the provisions of the Zoning Law of the City of New York, the Multiple Dwelling Law of the State of New York and the Constitution of the United States and the laws of Congress, for the purpose of depriving plaintiffs and other owners of property adjoining the subject premisesof their rights to equal protection of the laws and their rights, privileges and immunities under the Constitution of the United States, and for the purpose of protecting, furthering and preferring and favoring the interests of the defendants, Kimball Construction Co. Inc.,John Kimball and Marie A. Kimball to enable said defendants to keep and maintain an illegal multiple dwelling in the subject premises and gain great profit thereby in violation of law and in derogation and violation of the rights of plaintiffs and others similarly situated.

87. That the purpose of said conspiracy was to and did hinder, impede, obstruct and defeat the due course of justice, and to deny and deprive and did deny and deprive plaintiffs and other adjoining landowners of their rights to the equal protection of the laws and their rights, privileges and immunities under the Constitution of the United States and to get and did get preferential

treatment for the defendants, Kimball Construction Co. Inc, John Kimball and Marie A. Kimball relative to the usage of the subject premises in violation of law.

88. That in furtherance of said scheme and conspiracy, the defendants did engage in and commit many wrongful acts to the prejudice and damage of the plaintiffs and other adjoining landowners.

89. That in furtherance of said conspiracy, the defendants Kimball Construction Co. Inc., John Kimbal and Marie A. Kimball, on or about October 23, 1974, filed or caused to be filed with the Board of Standards and Appeals, an application for a variance under Sec. 72-21 of the New York City Zoning Law to permit the maintenance, operation and continuance of an illegal multiple dwelling in the subject premises.

90. That the grounds alleged in support of said application was alleged hardship and practical difficulty in that said defendant, Kimball Construction Co. Inc., claimed to have spent large sums of money to alter said subject premises to a Class A multiple dwelling during the hereinabove set forth litigation.

91. That thereafter the Board of Standards and Appeals directed hearing on said application and placed same on the hearing calendar under calendar #642-74BZ.

92. That upwards of 83 adjoining landowners including the plaintiffs herein filed sworn objections to the granting of such variance.

93. That hearings on said application were held on

January 29, 1975, February 18, 1975 and March 11, 1975 by the Board of Standards and Appeals which then adjourned the matter to March 25, 1975 for decision.

94. That under Sec. 200 sub. 5 and Sec. 66, sub. 7 of the New York City Charter, the power of the Board to grant variances is limited by the regulations embodied in Sec. 72-21 of the New York City Zoning resolution.

95. That Sec. 72-21 of the said zoning law, provides that before the Board may grant variances for alleged hardship or practical difficulties, it must make each and every one of five mandatory findings of fact based on substantial evidence.

96. That one of said mandatory findings of fact is that the variance requested shall be the minimum needed for relief.

97. That in the said application for a variance on the ground of alleged hardship, the defendants,Kimball Construction Co. Inc., John Kimball and Marie A. Kimball, alleged and claimed that the construction and maintenance of 13 apartments and another for s superintendent was the minimum necessary to afford hardship relief.

98. That in support of said allegation and claim, the defendants Kimball offered into evidence unsworn, unaudited, unverifie and frequently contradictory statements of alleged construction costs and expenditures in the alteration of said premises.

99. That at the aforementioned hearings, the objecting adjoining landowners , by their attorney , demanded proof of said alleged expenditures, such as contracts, vouchers, cancelled checks, bills etc.,

100. That the Board of Standards and Appeals ordered the defendants Kimball to produce such proof.

101. That the defendant Kimball refused and failed to produce such proof.

102. That upon such refusal, the defendants, Philip Agusta, Henry M. Carroll and John B. Walsh, over plaintiffs' objections, accepted the unaudited, unverified, unsworn and unsubstantiated and contradictory statements of alleged costs and expenditures submitted by defendants, Kimball, as correct.

103. That on information and belief, the said unaudited, unverified, unsubstantiated and contradictory allegations or statements of alleged costs and expenditures submitted by the defendants, Kimball, were grossly exaggerated and were false and fraudulent.

104. That, on information and belief, the defendants, Philip Agusta, Henry M. Carroll and John B. Walsh knew that the said statements of costs submitted by the defendants Kimball were grossly exaggerated and false and fraudulent.

105. That on information and belief, the said false and fraudulent statements of costs submitted by the defendants, Kimball were submitted with the knowledge and approval of the defendant, Julius Granirer.

106. That the said Julius Granirer, to further augment the alleged costs and expenditures claimed for the alteration and in furtherance of the aforesaid conspiracy, submitted to the Board of Standards and Appeals a statement of additional alleged charges and prospective fees.

107. That the defendant, Richmond Hill Savings Bank, in furtherance of said aforesaid conspiracy, did intervene in said hearings on the application for a variance and sent a letter dated January 27, 1975 to the Board of Standards and Appeals

requesting favorable consideration of Kimball's application for a variance on the alleged ground that as the holder of the purchase money mortgage on the subject premises, it, the bank would be seriously harmed and prejudiced if the variance were not granted.

108. That the said letter was signed by a vice-president of the bank, but on information and belief, was sent with the knowledge and consent and approval of the defendant Julius Granirer, as a trustee of said bank, and with the knowledge and approval and at the request of the defendant, Kimball.

109. That the said letter was accepted ex parte by the Board of Standards and Appeals as evidence on the issue of the alleged necessity for a variance.

110. That the said letter from the Richmond Hill Savings Bank was accepted by the Board without the knowledge of the objecting landowners or their attorney, or an opportunity to them to re-but or cross examine thereon.

111. That another one of the mandatory findings of fact required by Sec. 72-21 of the zoning resolution is that the hardship complained of as a basis for the variance application shall not have been created by the owner requesting same.

112. That where the hardship alleged is claimed to be the result of expenditures made under the authority of a subsequently invalidated permit, the good faith of the owner making such expenditures is a prime consideration before a variance may be granted.

113. That the Board of Standards and Appeals on the

issue of good faith, requested and directed the defendants Kimball to submit a breakdown of the alleged expenditures for the alteration showing how much was spent before the permit was issued, how much after the permit was issued but before action was taken by the adjoining landowners to vacate the permit, how much was spent from the time such action was taken until the decision in favor of the defendants, Kimball, in June 1973, and how much pending the appeal before the permit was vacated.

114. That the defendants Kimball refused and failed to submit such a breakdown.

115. That thereafter, the defendants, Philip Agusta, Henry M. Carroll and John B. Walsh accepted all the alleged expenditures claimed by the defendants Kimball without such a breakdown in evidence of good faith.

116. That on information and belief, such a breakdown with accompanying proof by vouchers, payrolls, checks etc., would have shown the bad faith of the defendants Kimball in that many of the expenditures were made even prior to the issuance of the illegal permit and most of them before the June 1973 decision upholding the permit, subsequently vacated by the Appellate Division.

117. That on information and belief, the defendants, Philip Agusta, Henry M. Carroll and John B. Walsh, knew when they failed to insist on the requested breakdown aforesaid, that the defendants Kimball could not produce such breakdown without negating their claims of good faith.

118. That under Sec. 666(6)-2.0 of the Administrative Code of the City of New York, the Board of Standards and Appeals is forbidden to vary or modify the provisions of the Multiple

Dwelling Law of the State of New York, except as to certain minor exceptions.

119. That under said provisions, the Board of Standards and Appeals had and has no jurisdiction to permit a variance altering the subject building, a wooden frame structure, to a Class A multiple dwelling.

120. That in furtherance of the conspiracy to deprive plaintiffs and other adjoining landowners of their rights to the equal protection of the laws, the defendants, Philip Agusta, Henry M. Carroll and John B. Walsh, refused and failed to give consideration and force to the said provisions of the Administrative Code and the provisions of the Multiple Dwelling Law, the defendant, Philip Agusta stating at the hearings that the Board was not bound by said provisions.

121. That at the hearings, the Board requested and received copies of the record on appeal of the Supreme Court Queens County action to vacate the permit and enjoin the conversion to a Class A multiple dwelling, and said record on appeal was made part of the record of proceedings before the Board of Standards and Appeals on the application for a variance.

122. That the defendants, Philip Agusta, Henry M. Carroll and John B. Walsh permitted the defendants Kimball, over the objections of the attorney for the objecting landowners, to re-litigate issues that had been litigated in the prior Supreme Court action and decided by the Appellate Division.

123. That another one of the mandatory findings of fact required by Sec. 72-21 of the Zoning Law is that the variance requested shall not be out of keeping with the character of the

neighborhood.

124. That the defendants, Philip Agusta, Henry M. Carroll and John B. Walsh, in furtherance of said conspiracy, refused and failed to give proper force and effect to the decision and order of the Appellate Division reversing the judgment of the Supreme Court, Queens County, and to the findings of fact made by the Appellate Division, and more particularly to the finding that the alteration was out of keeping with the character of the neighborhood.

125. That on March 25, 1975, the Board rendered a decision granting the requested variance to the Kimball Construction Co. Inc., but reducing the number of apartments to 11 with another for a superintendent.

126. That the said decision was rendered by a vote of three in favor, to wit, Commissioners Philip Agusta, Henry M. Carroll and John B. Walsh; one against, to wit, Commissioner Howard B. Hornstein, and one not voting, to wit, Commissioner Joseph B. Klein.

127. That said decision states that the Board had made and makes each and every finding of fact required by Sec. 72-21 of the Zoning Law.

128. That no such findings appear in the decision or the minutes of the hearings or of the final meeting at which the decision was announced.

129. That if any such findings were made, neither the objecting landowners or their attorney was given any notice or information regarding same or an opportunity to question or rebut.

130. That without such findings the Board of Standards

and Appeals had no jurisdiction to grant said variance.

131. That the five mandatory findings of fact required under Sec. 72-21 of the Zoning Law, if made, could only be made based on substantial evidence.

132. That there is no substantial evidence of any probative value in the record to substantiate or support such findings.

133. That the decision granting the variance made by the Board on March 25, 1975 is in violation of law, was made without jurisdiction and is absolutly null and void and of no force or effect whatsoever.

134. That under color of State Law, the defendants, Philip Agusta, Henry M. Carroll , John B. Walsh, Julius Granirer, the Richmond Hill Savings Bank, Kimball Construction Co. Inc. , John Kimball and Marie A. Kimballhave subjected and or caused to be subjected the plaintiffs herein and other adjoining landowners to th deprivationof their rights privileges and immunities secured by the Constitution and the Laws of the United States and their rights to the equal protection of the laws and to due process,

135. That as a result of the conspiracy hereinabove set forth entered into with each other by the defendants, Kimball Construction Co. Inc., John Kimball, Marie A. Kimball, Julius Granirer, the Richmond Hill Savings Bank and Philip Agusta, Henry M. Carroll and John B. Walsh to deprive plaintiffs and other adjoining landowners of the equal protection of the laws and of the equal privileges and immunities under the laws and to hinder

and prevent the duly constituted authorities of the State of New York to give and/or secure to them the equal protection of the laws, and as a result of the aforementioned acts committed by the said defendants in furtherance of said conspiracy, the plaintiffs and other adjoining landowners have suffered and still suffer and will continue to suffer great damage and depreciation in the value of their respective properties and deterioration of their neighborhood and were forced to expend and are still expending large sums of money in an effort to protect and enforce their rights and protect the value of their properties, all to their damage.

AS AND FOR A THIRD CAUSE OF ACTION AGAINST THE HONORABLES M. HENRY MARTUSCELLO, HENRY J. LATHAM, JOHN P. COHALAN, JR., SAMUEL RABIN AND VITO J. TITONE, AS JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, AND THE HONORABLE ALFRED D. LERNER , AS JUDGE OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF QUEENS.

136. Plaintiffs repeat and reallege each and every allegation contained in paragraphs numbered "1" through "135" of this complaint with the same force and effect as though more specifically herein set forth.

137. That after the decision by the Board of Standards and Appeals, dated March 25, 1975, granting the aforesaid variance, plaintiffs herein, pursuant to the provisions of law, duly instituted an Article 78 proceeding in the Supreme Court of the State of New York, Queens County at Special term Part 1, under index # 3754-1975, to review said determination of the Board of Standards and Appeals.

138. That pursuant to the provisions of law, by order dated October 31, 1975, signed by the HONORABLE ALFRED D. LERNER, Special Term Part 1 of the Supreme Court, Queens County , transferred the 78 proceeding to the Appellate Division of the Supreme Court of the State of New York, Second Department.

139. That said order signed by the Honorable Alfred D. Lerner contained a stay as follows:

> "Ordered that pending said transfer and disposition by the Appellate Division, the stay and restraining order heretofore granted and issued herein, be and the same hereby is continued and the respondents be and they hereby are stayed and restrained from executing or implementing the decision or determination or resolution of the Board of Standards and Appeals dated March 25, 1975 of which review is here sought or from any further construction on the premises or from applying for and/or obtaining and/or issuing another certificate of occupancypurporting to validate the alteration of the subject building to a Class A multiple dwelling. "

140. By decision and order dated March 1, 1976, the said Appellate Division , Second department, confirmed the unanimously determination of the Board of Standards and Appeals/and dismissed the Article 78 proceeding.

141. The decision so confirming the determination of the Board of Standards and Appeals states as follows:

> " Expenditures made in good faith reliance on a subsequently invalidated permit may be properly considered on an application for a variance on the ground of hardship (Matter of Jayne Estates v. Raynor 22 N.Y. 2d 417). The Board of Standards and Appeals found that respondent Kimball Construction Co. Inc. was entitled to relief '.on the grounds of practical difficulty and/or unnecessary hardship'. In view of the fact that Kimball had made vast expenditures in good faith reliance on the previously issued alteration permit, we agree with the assertion in the Board's answer that the denial of a variance would ' inflict a devastating financial blow'.

" This Court's earlier decision (Ellentuck v. Stein 44 A.D. 2d 714) related solely to the propriety of the issuance of the alteration permit. It did not foreclose consideration of the more expansive issues relevant to a variance application before the Board of Standards and Appeals. The fact that some of the issues before Board were discussed on an 'arguendo' basis in this court's prior decision did not preclude the Board's intensive consideration of those factors, based upon additional evidence(including a personal inspection of the premises and neighborhood), and its conclusion that those factors were not as 'dismal' as they had appeared to be in the earlier proceeding (relating to license issue), and further that they were out weighed by the elements of hardship."

142. Plaintiffs, herein, petitioners in the 78 proceeding thereupon filed a notice of appeal to the Court of Appeals from this order of the Appellate Division, Second Department, confirming the determination of the Board of Standards and Appeals, as a matter of right on constitutional grounds.

143. Respondent Kimball, in that action, then brought a motion to dismiss petitioners' appeal as of right on the ground that constitutional questions were not directly involved.

144. That while said motion was pending in the Court of Appeals of the State of New York and before it could be heard, one of the petitioners in that action advised his attorney that one of the Appellate Division judges who had participated in the decision and order confirming the determination of the Board of Standards and Appeals, to wit, JUSTICE HENRY J. LATHAM, was and had been disqualified and should not have participated therein, because he was at the time, a trustee of the Richmond Hill Savings Bank which had intervened in the proceeding before the Board of Standards and Appeals on the ground that it, the bank, would be seriously harmed and

prejudiced if the variance were not granted.

145. Under the Judiciary Law of the State of New York, Section 14, participation in the Appellate Division decision and order confirming the determination of the Board of Standards and Appeals granting the variance, by Justice Henry J. Latham made that decision and order absolutely void and in violation of due process.

146. The attorney for the petitioners, plaintiffs herein, immediately advised the Court of Appeals of this fact , that the decision and order from which petitioners were attempting to appeal was void because of Justice Latham's participation therein.

147. Under the law and the decisions no appeal lies or is necessary from a void decision.

148. Thereafter petitioners' appeal on constitutional grounds was dismissed by the Court of Appeals.

149. The petitioners thereafter sought leave from the Court of Appeals to appeal the void decision, but the motion was denied.

150. Under the law , the Court of Appeals has no original jurisdiction and may not consider matters not appearing in the record on appeal itself from the decision of the Court from which appeal is sought.

151. Under the law and the decisions, the Court of Appeals had and has no jurisdiction to consider the illegality of Judge Latham's participation in the void decision from which petitioners had sought leave to appeal, as the matters making such participation void do not appear in the record on appeal.

152. The petitioners in the 78 proceeding thereupon moved in the Appellate Division, Second Department for an order declaring the decision and order of that Court, in which Justice Latham had participated, void.

153. On April 27, 1976, the Appellate Division, Second Department, granted petitioners' motion " to the extent of permitting reargument and reconsideration and upon such, the Court's decision dated March 1, 1976 is adhered to.".

154. Justice Latham was one of the judges participating in the "reconsideration" but did not vote.

155. Under the law and the decisions, the presence of Justice Latham on the bench reconsidering the prior void decision, even if he did not vote, made the second decision equally void.

156. That thereafter, over petitioners' objections the defendant, Kimball Construction Co. Inc. on or about May 5, 1976, entered judgment in its favor in the 78 proceeding confirming the March 25, 1975 decision of the Board of Standards and Appeals, and vacating the stay contained in Judge Lerner's order of October 31, 1975.

157. That said judgment, entered on the basis of the void order and decision of the Appellate Division , Second Department, is likewise void and of no effect.

158. That said judgment was and is ineffective to vacate the stay contained in Judge Lerner's order of October 31, 1975 in that there is as yet no valid final disposition of the review of the determination of the Board of Standards and Appeals sought by petitioners in the 78 proceeding.

159. That the stay against the implementation and /or execution of the Board of Standard and Appeals' determination of March 25, 1975, is still in effect.

160. That thereafter and on or about May 11, 1976 petitioners in the 78 proceeding, brought a motion returnable May 24, 1976at Special term Part 1 of the Supreme Court, Queens County, to vacate said void judgment entered by defendant on or about May 5, 1976.

161. That said motion came on to be heard before the Honorable Alfred D. Lerner.

162. That on July ~~13~~ 23, 1976, the said Honorable Alfred D. Lerner denied said motion to vacate on the alleged ground "The decisions upon which this judgment is based have been reviewed by the Court of Appeals, are binding upon the Court and leave it no discretion whatever in the matter".

163. That none of the decisions upon which the said judgment is based have ever been reviewed by the Court of Appeals, the Court of Appeals having no jurisdiction to review same and having declined to take jurisdiction.

164. That plaintiffs are entitled to a judgment declaring the decisions of the Appellate Division, Second Department, dated March 1, 1976 and April 27, 1976 and the orders entered thereon , and the judgment entered on May 5, 1976 in the Supreme Court, Queens County based on said decisions, confirming the determination of the Board of Standards and Appeals and dismissing the 78 proceeding, null and void and of no force

or effect whatsoever, and enjoining the implementation and execution of said orders and judgment in that plaintiffs in that prior proceeding have been deprived of and denied due process under color of state law, and have been denied and deprived of their right to have the decision and determination of the Board of Standards and Appeals, dated March 25, 1975, granting the variance , reviewed by an impartial tribunal.

AS AND FOR A FOURTH CAUSE OF ACTION AGAINST THE BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK.

165. Plaintiffs repeat and reallege each and every allegation contained in paragraphs numbered "1" through "164" of this complaint with the same force and effect as though more specifically herein set forth.

166. That the creation of the Board of Standards and Appeals and its power to grant variances is governed by the provisions relative thereto contained in the New York City Charter, the Administrative Code of the City of New York and the Zoning Resolution of the City of New York effective December 1961, and the amendments thereto.

167. That pursuant to said provisions, variances may be granted only after public notice and hearing.

168. That pursuant to said provisions the Board has power to make its own rules and regulations as to the conduct of such hearings.

169. That by long established custom and usage such hearings have been and still are conducted very informally.

170. That the hearings on the Kimball application for a variance were conducted so informally as to violate all

the fundamental principles of due process.

171. That in addition to the instances of violations of due process in the conduct of the hearings hereinabove set forth in the second cause of action herein, due process was also violated, inter alia, as follows:

(a) that the rules of procedure adopted by the Board of Standards and Appeals provide that before hearings on an application for a variance can be held, notice of such hearings must be served in person or by registered mail on all adjoining property owners within a radius of 400 feet from the center of the subject property. In many instances such required notices were sent not to the property owners within the 400 foot radius of the Kimball property, but to the lending institutions holding the mortgages on such properties. Such service is defective under the principles of due process.

(b) Under its rules and regulations, the Board accepts such defective service as valid.

(c) That at the Kimball hearings, although the Board has power to administer oaths, no witness was sworn, and unsworn testimony was accepted as valid evidence.

(d) That at the Kimball hearings no opportunity was given to the objecting landowners for oral confrontation or cross-examination of witnesses, but all parties were directed to submit desired rebuttal in writing.

(e) That unsworn documents, statements and letters were received by the Board, ex parte, as alleged valid evidence, some of which documents etc., neither the objecting landowners nor their attorney ever saw or had opportunity to rebut until the

Board's certified record was served and filed in the Article 78 proceeding hereinabove referred to, brought to review the Board's determination.

(f) That unsworn statements, letters etc., were received by the Board, ex parte, even after the hearings were closed, as evidence, without any notice thereof or opportunity to rebut to the objecting landowners or their attorney.

(g) That no opportunity was given to the objecting landowners to subpoena the Kimball books and records to rebut the Kimball claims as to alleged costs and expenditures for the petition, or to obtain other evidence.

(h) That the Board for the first time belatedly made the five mandatory findings of fact required by the provisions of Sec. 72-21 of the Zoning Resolution, in its answer to the aforementioned 78 proceeding and the objecting landowners were never given an opportunity to examine such findings or voice any objections thereto prior to the determination by the Board granting the variance, the subject for review in the 78 proceeding.

(i) That in the alleged findings of fact submitted by the Board in its answer in the 78 proceeding, reference is made to inspection of the subject premises by a committee appointed by the Board. No report of such committee was ever made public, nor was it ever served on the objecting landowners or their attorney to give them an opportunity to rebut.

172. That on information and belief, the actions complained of herein in the conduct of the Kimball hearings violating the rights of these plaintiffs and the other adjoining

landowners
/to due process,are standard procedure in other variance proceedings before the Board.

173. That by long custom and usage, the conduct of hearings by the Board, without any regard for or adherence to due process and the fundamental principles thereof, has been and still is accepted as valid .

174. That as a result thereof, the plaintiffs herein and others similarly situated have been and still are being deprived of valuable property rights without due process of law.

175. That those portions of the New York City Charter, the Administrative Code of the City of New York, the Zoning Resolution of the City of New York and the rules and regulations for the conduct of hearings adopted by the Board of Standards and Appeals, which either by express statute or rule, or by failure to enunciate proper guide lines, permit deprivation of valuable property rights of plaintiffs and others without due process of law, are unconstitutional and void.

WHEREFORE, plaintiffs demand judgment on their own behalf and on behalf of the other objecting adjoining landowners and others similarly situated,

(1) On the first cause of action against the defendants Kimball Construction Co. Inc., John Kimball, Marie A. Kimball, Joseph Stein, H. Irving Sigman, and Erling Karlsen for damages in the sum of One Million ($1,000,000.) Dollars;

(2) On the second cause of action against the defendants Philip Agusta, Henry M. Carroll, John B. Walsh, Richmond Hill Savings Bank, Julius Granirer, Kimball Construction Co. Inc.,

John Kimball and Marie A. Kimball for damages in the sum of One Million ($1,000,000.) Dollars; for a declaratory judgment declaring the determination of the Board of Standards and Appeals dated March 25, 1975 granting a variance to the Kimball Construction Co. Inc., for premises known as 131-16 Rockaway Beach Boulevard, Queens, New York, null and void and of no effect as made without jurisdiction and in violation of law and due process; and for a permanent injunction enjoining and restraining the alteration and/or maintenance of the subject premises as a Class A multiple dwelling and restraining and enjoining the Board of Standards and Appeals from granting a variance therefor;

(3) On the third cause of action against the Appellate Division of the Supreme court of the State of New York, Second department, for a declaratory judgment declaring the decisions of said Appellate Division herein dated March 1, 1976 and April 27, 1976 and the orders entered thereon null and void and of no force or effect whatsoever and enjoining the implementation thereof; and against the Supreme Court of the State of New York, County of Queens, for a declaratory judgment declaring the judgment entered in the 78 proceeding referred to herein, on May 5, 1976 confirming the determination and decision of the Board of Standards and Appeals granting the variance, dated March 25, 1975, null and void and vacating same on the record; and

(4) On the fourth cause of action against the Board of Standards and Appeals of the City of New York for a judgment declaring those portions of the New York City Charter, the

Administrative Code of the City of New York, the Zoning Resolution of the City of New York and the rules and regulations adopted by the Board of Standards and Appeals which permit the deprivation of valuable property rights of owners of property without due process of law, unconstitutional and void and enjoining and restraining the conduct of future hearings hearings by the Board of Standards and Appeals without regard to due process of law which hearings result in or may result in the deprivation of of valuable property rights without due process; and

(5) For such other, further and different relief as may be just in the premises together with the costs and disbursements of this action.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IRVING ELLENTUCK, et al.,

Plaintiffs,

- v -

JOSEPH B. KLEIN, et al.,

Defendants.

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LAWRENCE W. PIERCE, D.J.

MEMORANDUM AND ORDER

This is an action brought pursuant to 42 U.S.C. §1983 and §1985 seeking equitable relief and money damages. Plaintiffs are a class of homeowners, residing on or near the block where one defendant, Kimball Construction Co. ("Kimball") has converted a former convent home for the aged into a multiple dwelling. The gravamen of the complaint is plaintiffs' allegation that they have been deprived of a property right without due process of law.

Each of the twenty-two defendants now move to dismiss the complaint on the ground, inter alia, that the claims asserted by the plaintiffs are barred by the doctrines of res judicata and collateral estoppel, as well as by principles of federal-state comity. For the reasons that follow, the motions are granted.

The Court views the primary issue here to be whether the proceedings in the administrative tribunals,

trial and appellate courts of the State of New York operate as a bar to the maintenance of this action in federal district court. Bearing this issue in mind, it is appropriate to trace this action's journey through the state system.

The history of the legal and administrative proceedings in this controversy dates back to November 1972, when the Department of Buildings for the City of New York first approved Kimball's plans for the renovation of the convent-home. Under the authority of that permit, Kimball immediately commenced construction to convert the home, a Class "B" multiple dwelling, into a Class "A" multiple dwelling containing fourteen separate dwelling units.

Shortly thereafter, an association known as the Belle Harbor Property Owners sought to have the permit invalidated. Following a number of communications with H. Irving Sigman, Queens Borough Superintendent, and Joseph Stein, New York City Commissioner of Buildings, the request of the property owners association was denied on January 31, 1973.

In the interim, on December 21, 1972, each of the ten persons named as individual plaintiffs in this action, on their own behalf and on behalf of other property owners in the area near the construction site, commenced an action in the Supreme Court of the State of New York, Queens County, seeking to vacate and declare the permit

null and void as in violation of New York City Zoning Resolutions, and to enjoin Kimball from altering the premises and from constructing any apartments (See Ex. G to Def. Klein motion to dismiss). Named as defendants in that action were Stein, Sigman, Kimball, and Erling Karlsen, a Buildings Department Examiner. Each of these four persons are also named as defendants here.

Following trial, plaintiffs' action in Supreme Court was dismissed on the merits on July 2, 1973, the court ruling that the prior use of the buildings by the nuns had been a non-conforming use and that therefore the proposed conversion constituted a permissible change from the Class "B" to Class "A" occupancy. Ellentuck v. Stein, No. 15207/72 (Sup. Ct. Queens Cty. July 2, 1973).

Plaintiffs filed an appeal, and the January 1974 term of the Appellate Division, Second Department, was designated for argument. On March 13, 1974, after the appeal had been submitted but before a decision was rendered, Kimball received a certificate of occupancy indicating conformance with the rules of the Board of Standards and Appeals of the City of New York ("BSA").

On April 29, 1974, the Appellate Division reversed the decision of the trial court and declared the permit null and void and the proposed alteration illegal. The court also enjoined Kimball from further construction under the permit and from altering the premises to a Class

"A" multiple dwelling. Ellentuck v. Stein, 44 App. Div. 2nd 714, 354 N.Y.S. 705 (2d Dep't 1974).

In accordance with the decision of the Appellate Division, the New York City Department of Buildings promptly filed an application with the BSA for revocation of the previously issued certificate of occupancy. In January, February and March of 1974, the BSA held several hearings on the matter, which hearings were attended by certain of the defendants and plaintiffs herein, as well as by other property owners living in the proximity of the Kimball building. On October 1, 1974, the certificate of occupancy was revoked.

On October 23, 1974, Kimball applied to the BSA for a variance on the ground of hardship. The BSA, on March 25, 1975, held that it had made "each and every one of the required findings" and granted Kimball the variance requested pursuant to §72-21 of the Zoning Resolutions of the City of New York.[1]

By petition and order to show cause dated March 27, 1975, eight of the persons named as plaintiffs in this action commenced an Article 78 class action proceeding in the Supreme Court, Queens County, seeking to annul

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1/ See Ex. 4 to Appellants' Notice of Motion for Leave to Appeal to the New York Court of Appeals, dated April 16, 1976. The Zoning Resolutions of the City of New York, adopted by the Board of Estimate, confer statutory power upon the BSA to grant variations from the Zoning Resolutions where there are practical difficulties or unnecessary hardships in carrying out the letter of such provisions. See Section 72-21.

the variance granted by the BSA. Named as respondents to 78 proceeding were eight of the persons named as defendants herein.

On June 16, 1975, the petitioners (plaintiffs herein) moved by separate motion for an order revoking and annulling the decision of the BSA on the ground that the BSA was without jurisdiction to make the determination. They further maintained that the determination of the BSA had the unlawful effect of overruling and vacating the April 24, 1974 decision of the Appellate Division. In the alternative, the petitioners moved for a transfer of the Article 78 proceeding to the Appellate Division. By Supreme Court order dated October 31, 1975, the matter was so transferred pursuant to N.Y. C.P.L.R. §7804(g) (McKinneys 1963) (See Ex. A-1 and A-8 to Jnt. App. filed in the Appellate Division).

By decision dated January 30, 1976, and order dated March 1, 1976, the Appellate Division dismissed the petition on the merits. In so doing the court affirmed the BSA's finding that Kimball was entitled to relief from "unnecessary hardship." Rejecting the petitioners' argument, the court held that its April 1974 decision was based solely upon the propriety of the issuance of the building permit, and that the BSA was not thereafter foreclosed from granting a variance to Kimball. Ellentuck v. Klein, 51 App. Div. 2d 964, 380 N.Y.S.2d 327 (2d Dep't 1976).

Petitioners, asserting that there were constitutional questions invcIved, filed on March 10, 1976 a notice of appeal as of right to the New York State Court of Appeals (see Ex. A to Kimball Affd. dated Nov. 23, 1976). While that appeal was pending, petitioners learned that the Hon. Henry J. Latham one of the Justices presiding on the Appellate Division panel, was a trustee of the Richmond Hills Savings Bank ("the Richmond Bank"), a defendant named herein and mortgagee on the Kimball mortgage for the subject building. Petitioners thereupon filed with the Court of Appeals an affidavit detailing Justice Latham's relationship to the Richmond Bank.

On respondents' motion, petitioners' first appeal to the Court of Appeals was dismissed on April 6, 1976 "on the ground that no substantial constitutional question was directly involved." Ellentuck v. Klein, 39 N.Y.2d 743 (1976).

Petitioners then moved in the Appellate Division to vacate that court's March 1, 1976 decision by reason of the alleged disqualifying interest. On April 27, 1976, the Appellate Division granted the motion to the extent of permitting reargument. Upon such reargument the court adhered to its original determination. Justice Latham again sat on the panel but did not participate in the vote.

Petitioners then moved the Court of Appeals for leave to appeal from the April 27, 1976 decision of the Appellate Division, and that motion was denied on May 6,

1976. Ellentuck v. Klein, 39 N.Y. 2d 707 (1976). Petitioners also filed an appeal as of right from that same Appellate Division order, on constitutional grounds, specifically challenging the propriety of Justice Latham's participation in the Appellate Division proceedings. That last appeal was dismissed by the Court of Appeals sua sponte, upon the ground that no substantial constitutional question was directly involved. Ellentuck v. Klein, 40 N.Y.2d 844 Sept. 8, 1976).

The plaintiffs sought relief once more in the state forum even after filing a complaint in this court. On July 12, 1976, plaintiffs moved before Justice Lerner in Queens County Supreme Court, Special Term, for an order vacating the final judgment entered in that court. In denying the motion, Justice Lerner ruled as follows:

> "The decisions upon which this judgment is predicated, having been reviewed by the Court of Appeals, are binding upon this court and leave it no discretion whatever in the matter." (Ellentuck v. Klein, No. 3754/75 (Sup. Ct. Queens Cty. July 23, 1976)).

On June 22, 1976, the same ten persons involved in the state litigation commenced this purported class action asserting claims under the civil rights acts, on their own behalf and on behalf of the same class described in state court. Named as defendants here are the eleven persons named in the various state court proceedings; Justice Latham and the other members of the Appellate Division panel; Justice Lerner of the Supreme Court, Queens County; the Richmond Bank; Julius Granirer, a trustee of that bank; and two

officers of Kimball Construction Co.

In the amended complaint's first count, plaintiffs seek money damages against Kimball, its officers, and defendants Stein and Karlsen by reason of an alleged conspiracy to violate plaintiffs' constitutional rights, which alleged conspiracy flows from the identical facts and circumstances litigated in the state proceedings.

The second count seeks damages against the commissioners of the BSA, the Richmond Bank and its trustee, and Kimball and its officers, alleging a conspiracy to violate the laws of the City and State of New York and the Constitution of the United States. The alleged vehicle for this conspiracy was the application for and the granting of the same variance which was the subject of the Article 78 proceeding. Count two also seeks a declaratory judgment declaring null and void the granting of that variance, and a permanent injunction against any alteration of the convent-home. The identical relief sought in count two was denied in the state courts.

The complaint's third claim names as defendants the Justices of the Appellate Division and Justice Lerner of the Supreme Court. In this count plaintiffs seek a declaratory judgment declaring null and void the decisions of the Appellate Division dated March 1, 1976 and April 27, 1976, and vacating the final judgment entered in Queens County Supreme Court on May 5, 1976.

The fourth count against the Board of Standards and Appeals only seeks a declaration that the New York City laws, rules, and regulations involved in the variance hearing and procedures, as applied to the plaintiffs, deprived them of their constitutional rights to due process of law.

Discussion

Without further detailing the claims that are the subject of the amended complaint, it is evident from the records filed with the state appellate courts that the issues raised in this action were addressed and finally adjudicated by those courts. It is clear beyond peradventure that the federal, state, local and administrative claims made by the plaintiffs here were thoroughly litigated in the state forum. Plaintiffs were not required to challenge the administrative actions through the vehicle of an Article 78 proceeding, but having done so, the litigants made their choice of forum. They may not now try for a "second bite at the cherry." Lackawanna Police Benevolent Association v. Balen, 446 F.2d 52, 53 (2d Cir. 1971) (per curiam); see Lombard v. Board of Education of the City of New York, 502 F.2d 631, 637 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975).

Plaintiffs' access to the federal district courts, for the purpose of raising any of these constitutional claims, was barred when they selected the state courts to hear their due process arguments. Tang v. Appellate Division of New York Supreme Court, First Department, 487 F.2d 138 (2d Cir. 1973),

cert. denied, 416 U.S. 906 (1974).

A state court litigant cannot avoid the effects of res judicata and collateral estoppel by casting a previously adjudicated claim, or a claim which could have been adjudicated in the prior action, in the mold of a claim under the civil rights acts. Bricker v. Crane, 468 F.2d 228, 1231-32 (1st Cir. 1972), cert. denied, 410 U.S. 930 (1973); see Katz v. Connecticut, 433 F.2d 878 (2d Cir. 1970) (per curiam). Moreover, allowing unsuccessful state court litigant to use the civil rights act as a vehicle to escape the consequences of that prior determination is a blunt and unnecessary affront to the state legal system. See Tang, supra, at 143. This principle is particularly apposite here in light of plaintiffs' relentless pursuit of relief in state court.

The New York State Courts have squarely confronted each of the constitutional claims now raised by the plaintiffs in this forum. Since the New York Court of Appeals dismissed two of plaintiffs' appeals on the ground that they presented no substantial constitutional question, it is frivolous for plaintiffs to suggest that the constitutionality of the actions of each of the twenty-two defendants herein was not adjudicated by the state courts.[2]

2/ Although the state courts adjudicated no damages claims, here those claims are based upon constitutional claims which have been adjudicated against plaintiffs. Further, the defendants who are named here but who were not sued in state court can bar plaintiffs' action by collateral estoppel, or "issue preclusion". See Lombard, supra, 502 F.2d at 637.

The fact that the Court of Appeals rendered no opinion on the matter does not alter this result. Grubb v. Public Utilities Commission, 281 U.S. 470, 477-78 (1930); Lecci v. Cahn, 493 F.2d 826, 830 (2d Cir. 1974).

It is equally clear that the issues of Justice Latham's alleged disqualifying interest was a matter considered and resolved by the New York Court of Appeals. This issue was before the Appellate Division on reargument and was thrice placed squarely before New York State's highest court. The Court of Appeals' dismissal of each of plaintiffs' appeals constituted an explicit rejection of plaintiffs' application to vacate the decision of the Appellate Division. Under the circumstances of this case, these dismissals were adjudications on the merits which render the matters that were the subject of those appeals inappropriate for renewed consideration here. See Lecci v. Cahn, supra.

An examination of each of the four counts of the amended complaint demonstrates that what plaintiffs in fact seek here is further appellate review of the decisions of the state tribunals. The United States Supreme Court has ruled, and the lower federal courts repeatedly have held, that a federal district court lacks the power to review finally adjudicated state court determinations of constitutional claims. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); Duke v. State of Texas, 477 F.2d 244, 253

5th Cir. 1973); Louis Ender, Inc. v. General Foods Corp., 467 F.2d 327 (2d Cir. 1972); Anderson v. Lecon Properties, Inc., 457 F.2d 929 (8th Cir. 1972) (per curiam); Sreter v. Hynes, 419 F.Supp. 546 (E.D.N.Y. 1976) (Pratt, J.).

> "The proper procedure for [plaintiffs] to follow in order to vindicate what [they] assert to be [their] constitutional rights was to appeal the decision of the state courts to the Supreme Court. Absent such an appeal the constitutional issues were conclusively determined against [plaintiffs]." (Louis Ender, Inc., supra, 467 F.2d at 332)

Indeed, in the very case from which this doctrine derives
derives, the Supreme Court held that the allegation of a disqualifying interest on the part of a state appellate judge did not alter the federal district court's basic inability to hear the case. Rooker v. Fidelity Trust Co., 263 U.S. 413, 417 (1923).

Accordingly, defendants' motions to dismiss the amended complaint in its entirety are hereby granted.

The amended complaint is hereby dismissed with prejudice and with costs.

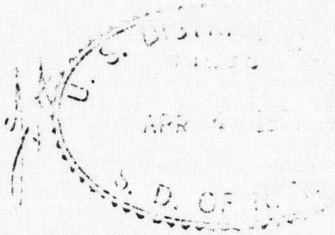
SO ORDERED.

Dated: New York, New York
March 31, 1977

s/ Lawrence W. Pierce
LAWRENCE W. PIERCE
U.S.D.J.

Pierce, J

54A



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

IRVING ELLENTUCK, et al : 76 Civil 2752 (LWP)

Plaintiffs :

-against- :

JOSEPH B. KLEIN, et al : JUDGMENT

Defendants :

- X

Defendants having moved the Court for an order to dismiss the complaint, pursuant to Rule 12(b)(1) and (6), of the Federal Rules of Civil Procedure, and the said motions having come on to be heard before the Honorable Lawrence W. Pierce, United States District Judge, and the Court thereafter on March 31, 1977, having handed down its opinion granting the said motions, it is,

ORDERED, ADJUDGED and DECREED: That defendants JOSEPH B. KLEIN, et al, have judgment against plaintiffs IRVING ELLENTUCK, et al, dismissing the amended complaint in its entirety with prejudice and with costs to be taxed.

Dated: New York, N.Y.
April 4, 1977

Raymond S. Burgharat
Clerk

PLAINTIFF'S EXHIBIT 3

____ A D 2d ____ A - February 5, 1974

35 E Irving Ellentuck et al., appellants, v. Joseph Stein, as Commissioner of Buildings of the City of New York, et al., respondents.

In an action by owners and residents of real property adjoining or near real property owned by defendant Kimball Construction Co., Inc. for a judgment (1) declaring said defendant's proposed alteration of its building from a single-family to a multiple dwelling to be a violation of the zoning resolution of the City of New York, (2) vacating the permit for the alteration and (3) enjoining the alteration, plaintiffs appeal from a judgment of the Supreme Court, Queens County, entered July 2, 1973, in favor of defendants, dismissing the complaint, after a nonjury trial.

Judgment reversed, on the law and the facts, with costs to appellants against defendant Kimball Construction Co., Inc.; it is adjudged that the permit is null and void and that the proposed alteration is illegal; the permit is vacated; and defendant Kimball Construction Co., Inc. is permanently enjoined from further construction under the permit and from altering the building to a Class A multiple dwelling.

The subject frame premises, 131-16 Rockaway Beach Boulevard, Belle Harbor, Queens, was originally constructed in 1908. In 1946 the Department of Housing and Buildings of the City of New York marked its records as follows: "Accept as a Class B Heretofore Converted Dwelling * * * I [Chief Inspector, Queens Housing] hereby direct that the above premises be registered * * * as a Class B multiple dwelling (rooming house)". In 1950, the Sisters of Reparation of Mary, Inc., a membership corporation organized for religious and charitable purposes, acquired the premises. Thereafter, under a 1950 permit, Sisters made certain alterations.

We find the evidence inconclusive as to plaintiffs' claims that between 1946 and 1950 there was an illegal addition of five furnished basement rooms, that the alterations under the 1950 permit were illegal and that by virtue thereof the continued occupancy as a Class B multiple dwelling became illegal.

However, we find the evidence overwhelming (e.g., Sisters' testimony, tax exemptions, combustible permit fee exemptions, 1968-1969 telephone directory, other documents, etc.) that from approximately 1951 to 1972 the Sisters operated the premises as a convent and, on a charitable nonprofit basis, primarily as a home for homeless and/or aged women. This usage is a conforming usage under R-2 classification (detached residences) imposed by the zoning ordinance resolution that

became effective in December, 1961. In June, 1972 defendant Kimball acquired the premises and thereafter obtained a permit to alter them into a Class A multiple dwelling, with 14 apartments plus an apartment for a superintendent. Although conversion from one lawful nonconforming use to another nonconforming use was authorized by law, we find that the evidence clearly established that the Class B classification was clearly abandoned by the Sisters' conforming usage from 1952 until the 1972 transfer to Kimball and that, in any event, in view of the character of the neighborhood, the nature of the conversion, and the dismal assessment of the conversion by Borough Superintendent Sigman of the Department of Buildings of the City of New York, on December 8, 1972, the 1972 alteration permit permitting the conversion should not have been granted.

HOPKINS, Acting P.J., MARTUSCELLO, LATHAM, CHRIST and BRENNAN, JJ., concur.

PLAINTIFF'S EXHIBIT 4

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 29, 1974.

HON. JAMES D. HOPKINS, Acting Presiding Justice
HON. M. HENRY MARTUSCELLO
HON. HENRY J. LATHAM
HON. MARCUS G. CHRIST
HON. ARTHUR D. BRENNAN
Associate Justices

Irving Ellentuck et al.,

Appellants,

v.

Joseph Stein, as Commissioner of Buildings of the City of New York, et al., and Kimball Construction Co., Inc.

Respondents.

Order on Appeal from Judgment.

In the above entitled cause, the above named Irving Ellentuck et al., plaintiffs, having appealed to this court from a judgment of the Supreme Court, Queens County, entered July 2, 1973, in favor of defendants, dismissing the complaint, after a nonjury trial, by owners and residents of real property adjoining or near real property owned by defendant Kimball Construction Co., Inc. for judgment (1) declaring said defendant's proposed alteration of its building from a single-family to a multiple dwelling to be a violation of the zoning resolution of the City of New York, (2) vacating the permit for the alteration and (3) enjoining the alteration; and the said appeal having been submitted by Dora Aberlin, Esq., of counsel for the appellants, and submitted by Harold Hyman, Esq., of counsel for the respondent Kimball Construction Co., Inc., and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the judgment appealed from is hereby unanimously reversed, on the law and the facts, with costs to appellants against defendant Kimball Construction Co., Inc., and it is further

ORDERED and ADJUDGED that the permit is null and void and that the proposed alteration is illegal; the permit is vacated; and defendant Kimball Construction Co., Inc. is permanently enjoined from further construction under the permit and from altering the building to a Class A multiple dwelling.

Enter:

Irving N. Selkin

PLAINTIFF'S EXHIBIT 14

_____ A D 2d _____ .

A - January 30, 1976

421 E

Irving Ellentuck et al., etc., petitioners, v. Joseph B. Klein et al., as Commissioners constituting the Board of Standards and Appeals of the City of New York, et al., respondents.

Dora Aberlin, New York, N.Y. (Mark R. Bryce, petitioner pro se, on the brief), for petitioners.

Sheldon Lobel, Woodside, N.Y., for respondent Kimball Construction Co., Inc.

W. Bernard Richland, Corporation Counsel, New York, N.Y. (no brief submitted), for respondents Joseph B. Klein et al.

Proceeding pursuant to CPLR article 78 to review a determination of the Board of Standards and Appeals of the City of New York, made on March 25, 1975, after a hearing, which granted the application of respondent Kimball Construction Co., Inc., for a variance permitting the maintenance of an existing four-story frame building as a multiple dwelling in an R-2 district, upon stated conditions.

Determination confirmed and proceeding dismissed on the merits, with one bill of costs to respondent Kimball payable by petitioners.

Expenditures made in good faith reliance on a subsequently invalidated permit may be properly considered on an application for a variance on the ground of hardship (Matter of Jayne Estates v. Raynor, 22 NY2d 417). The Board of Standards and Appeals found that respondent Kimball Construction Co., Inc., was entitled to relief "on the grounds of practical difficulty and/or unnecessary hardship." In view of the fact that Kimball had made vast expenditures in good faith reliance on the previously issued alteration permit, we agree with the substance of the board's answer that the denial of a variance would "inflict a devastating financial blow".

This court's earlier decision (Ellentuck v. Stein, 44 AD2d 714) related solely to the propriety of the issuance of the alteration permit. It did not foreclose consideration of the more expansive

60 A

issues relevant to a variance application before the Board of Standards and Appeals. The fact that some of the issues before the board were discussed on an "arguendo" basis in this court's prior decision did not preclude the board's intensive consideration of those factors, based upon additional evidence (including a personal inspection of the premises and neighborhood), and its conclusion that those factors were not as "dismal" as they had appeared to be in the earlier proceeding (relating to license issuance), and, further, that they were outweighed by the elements of hardship.

MARTUSCELLO, Acting P.J., LATHAM, COHALAN, RABIN and TITONE, JJ., concur.

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jm

PLAINTIFF'S EXHIBIT 15

At a ...m of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on March 1, 1976.

HON. FRANK A. GIBBONS, Presiding Justice,
HON. M. HENRY MARTUSCELLO,
HON. HENRY J. LATHAM,
HON. JOHN P. COHALAN, JR.,
HON. SAMUEL RABIN,
HON. VITO J. TITONE,
Associate Justices

Irving Ellentuck et al., etc.,

Petitioners,

v.

Joseph B. Klein et al., as Commissioners constituting the Board of Standards and Appeals of the City of New York, et al.,

Respondents.

Order

The above named Irving Ellentuck et al., etc., petitioners, having instituted this proceeding pursuant to CPLR article 78, by a petition verified March 26, 1975, to review a determination of the Board of Standards and Appeals of the City of New York, made on March 25, 1975, after a hearing, which granted the application of respondent Kimball Construction Co., Ind., for a variance permitting the maintenance of an existing four-story frame building as a multiple dwelling in an R-2district upon stated conditions; the respondents having filed answers thereto; by order of the Supreme Court, Queens County, the proceeding was transferred to this court for determination; and the said

proceeding having been argued by Dora Aberlin, Esq., of counsel for the petitioners, submitted by L. Kevin Sheridan, Esq., of counsel for the respondents Joseph B. Klein et al., without a brief and argued by Sheldon Lobel, Esq., of counsel for the respondent Kimball Construction Co., Inc., due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is unanimously

ORDERED that the determination is hereby confirmed and proceeding dismissed on the merits, with one bill of costs to respondent Kimball payable by petitioners.

Enter:

Plaintiffs' Exhibit 15

Clerk of the Appellate Division.

NEW YORK STATE COURT OF APPEALS ORDER DISMISSING APPEAL

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixth *day of* April *A. D.* 197 6

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

2 Mo. No. 312
Irving Ellentuck, et al.,
Appellants,
vs.
Joseph B. Klein, et al.,
Respondents.

A motion having heretofore been made herein upon the part of the respondents to dismiss the appeal taken by the appellants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved.

Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

Defendant Kimball's
IB, T "B"

OPINION AND ORDER OF APPELLATE DIVISION, SECOND DEPARTMENT

No. 1743

Irving Ellentuck et al., etc., petitioners, v. Joseph B. Klein et al., as Commissioners constituting the Board of Standards and Appeals of the City of New York et al., respondents.

Motion by petitioners to vacate and declare null and void the decision and order of this court, dated March 1, 1976, which confirmed the determination of the respondent Board of Standards and Appeals, dated March 25, 1975.

Motion granted to the extent of permitting reargument and reconsideration and upon such, the court's decision dated March 1, 1976 is adhered to.

MARTUSCELLO, Acting P.J., COHALAN, RABIN and TITONE, JJ., concur.

LATHAM, J., not voting.

Plaintiffs' Exhibit 19

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s

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 27, 1976.

HON. [redacted]
HON. [redacted]
HON. M. HENRY MARTUSCELLO. — Acting Presiding Justice
HON. HENRY J. LATHAM.
HON. JOHN P. COHALAN, JR.,
HON. [redacted]
HON. [redacted] — Associate Justices
HON. [redacted]
HON. SAMUEL RABIN.
HON. [redacted]
HON. VITO J. TITONE.
HON. [redacted]

Irving Ellentuck et al., etc.,

Petitioners,

v.

Order

Joseph B. Klein et al., as Commissioners constituting the Board of Standards and Appeals of the City of New York et al.,

Respondents.

In the above entitled cause, the petitioners having moved to vacate and declare null and void the decision and order of this court, dated March 1, 1976, which confirmed the determination of the respondent Board of Standards and Appeals, dated March 25, 1975;

Now, upon the papers filed in support of and in opposition to the motion; and upon the papers on which the determination was confirmed; and the motion having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the said motion is hereby granted to the extent of permitting reargument and reconsideration and upon such, the court's decision dated March 1, 1976 is adhered to.

MARTUSCELLO, Acting P.J., COHALAN, RABIN and TITONE, JJ., concur.

LATHAM, J., not voting.

Plaintiffs' Exhibit 20

Enter:

IRVING N. SELKIN

ORDER OF NEW YORK STATE COURT OF APPEALS DATED MAY 6, 1976 DENYING PETITIONERS' MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixth *day of* May *A. D.* 1976

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

2 Mo. No. 473
Irving Ellentuck, et al.,
Appellants,
vs.
Joseph B. Klein, et al., as Commissioners constituting the Board of Standards and Appeals of the City of New York, et al.,
Respondents.
and
Kimball Construction Co. Inc.,
Respondents.

and for a stay &c.

A motion for leave to appeal/to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

JUDGE LERNER'S ORDER DATED JULY 23, 1976 DENYING MOTION OF PETITONERS TO VACATE VOID JUDGMENT

SHORT FORM ORDER

SUPREME COURT – STATE OF NEW YORK

Present:
HON. ALFRED D. LERNER
Justice.

XXXX/SPECIAL TERM, PART I
QUEENS COUNTY

IRVING ELLENTUCK et al,

Petitioners

– against –

JOSEPH B. KLEIN, et al,

Respondents

INDEX NUMBER 3754/75, 19....

MOTION DATE July 12th, 1976

MOTION CAL. NUMBER 18

TRIAL CAL. NUMBER .....

The following papers numbered 1 to 16 read on this motion by petitioners to vacate judgment dated May 5th, 1976.....is denied

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause – Affidavits – Exhibits	1--13
Answering Affidavits – Exhibits	14--15
Replying Affidavits	16
Pleadings – Exhibits – Stipulation	

Briefs: Plaintiff's/Petitioner's ..... Defendant's/Respondent's .....

Upon the foregoing papers it is ordered that this motion .....

The decisions upon which this judgment is predicated, having been reviewed by the Court of Appeals, are binding upon this court and leave it no discretion whatever in the matter.

Dated JULY 23rd, 1976

ALFRED D. LERNER
J.S.C.

~~EXHIBIT "E"~~
Defendant Kimball's
Exhibit E

AMENDED COMPLAINT, QUEENS COUNTY ACTION, ELLENTUCK et al v. STEIN et al.

SUPREME COURT : QUEENS COUNTY

IRVING ELLENTUCK and MILDRED ELLENTUCK, ELAINE FARKAS, STEWART HORNIN and BARBARA HORNIN, A. GERARD HYDE, NORMA MASKIN, BETTY NOBEL, SAUL NOVAK and PHYLLIS NOVAK, LEO SIEGEL and PEARL SIEGEL, HENRY JORGENSEN, ARTHUR UPELNIEKS and IRMGARD UPELNIEKS, MILTON ZINAR and RUTH ZINAR, LEONARD SAVINO, ERNESTINE FEINLAND, JOHN B. GEISELMAN, Jr.,and MARGUERITE GEISELMAN, DOROTHY INEZ KRAEGER, LEO MACKTA and REGINA MACKTA, FRANCIS MALONEY and KATHLEEN MALONEY, JEROME NADEL and MILDRED NADEL, HERBERT QUELL and BRIDGET QUELL, KEVIN P. WILKINSON and MARGARET WILKINSON and MILDRED ZOLLER, and MARY KING and RITA KING,

Plaintiffs

against

JOSEPH STEIN, H.I.SIGMAN, ERLING KARLSEN and KIMBALL CONSTRUCTION CO. INC.,

Defendants.

AMENDED COMPLAINT

Plaintiffs, complaining of the defendants, by DORA ABERLIN their attorney, allege:

1. That at all the times hereinafter mentioned, the defendant Joseph Stein was and now is the Commissioner of Buildings for the City of New York.

2. That at all the times hereinafter mentioned, the defendant H. I. Sigman was and now is the Borough Superintendent for the Department of Buildings of the City of New York, for the Borough of Queens.

Defendant Board of Standards & Appeals

3. That at all the times hereinafter mentioned, the defendant Erling Karlsen was and now is the inspector for the Department of Buildings, Borough of Queens, who approved the plans and the issuance of the permit for the alteration subject of this litigation, as hereinafter more fully set forth.

4. That on information and belief, at all the times hereinafter mentioned, the defendant, Kimball Construction Co. Inc., was and still is a domestic corporation, duly organized and existing under the laws of the State of New York.

5. That the defendant, Kimball Construction Co. Inc. is the owner of record of premises known as 131-16 Rockaway Beach Boulevard, situated in Block 16265, as Lot 45, on the corner of Rockaway Beach Boulevard and Beach 132nd Street, between Rockaway Beach Boulevard and Newport Avenue, in Belle Harbor, Borough of Queens, County of Queens, City and State of New York.

6. That on information and belief, the said defendant, Kimball Construction Co.Inc., acquired title to said premises on or about June 6, 1972 from the former owners of record thereof, the Sisters of Reparation of the Congregation of Mary, Inc.

7. That on information and belief, the Sisters of Reparation of the Congregation of Mary, Inc., acquired title to said premises on or about June 14, 1950.

8. That on information and belief, the plaintiffs Irving Ellentuck and Mildred Ellentuck, at all the times hereinafter mentioned were and still are the owners of record of

premises known as 257 Beach 132nd Street, situated in Block 16266 as Lot 14 of Belle Harbor, Queens, New York, between Rockaway Beach Boulevard and Newport Avenue, across the street from the aforesaid premises owned by the defendant Kimball Construction Co.Inc., known as 131-16 Rockaway Beach Boulevard.

9. That on information and belief, the plaintiff Elaine Farkas, at all the times hereinafter mentioned, was and still is the owner of record of premises known as 241 Beach 132nd Street, situated in Block 16266 as Lot 14 of Belle Harbor, Queens, New York, between Rockaway Beach Boulevard and Newport Avenue, across the street from the aforesaid premises owned by the defendant Kimball Construction Co.Inc.

10. That on information and belief, the plaintiffs Stewart Hornin and Barbara Hornin, at all the times hereinafter mentioned, were and still are the owners of record of premises known as 227 Beach 132nd Street, situated in Block 16266 as Lot 29 of Belle Harbor, Queens, New York, between Rockaway Beach Boulevard and Newport Avenue, almost directly across the street from the aforesaid premises owned by the defendant Kimball Construction Co.Inc.

11. That on information and belief, the plaintiff A. Gerard Hyde, at all the times hereinafter mentioned, was and still is the owner of record of premises known as 238 Beach 132nd Street, situated in Block 16265 as Lot 63, of Belle Harbor, Queens, New York, between Rockaway Beach Boulevard and Newport Avenue, in the same block with the aforesaid premises owned by the aforesaid defendant Kimball Construction Co.Inc.

12. That on information and belief, the plaintiff Norma Maskin at all the times hereinafter mentioned, was and still is the owner of record of premises known as 250 Beach 132nd Street in Block 16265 as Lot 55, of Belle Harbor, Queens, New York, between Rockaway Beach Boulevard and Newport Avenue, in the same block as the aforesaid premises owned by the defendant Kimball Construction Co.Inc.

13. That on information and belief, at all the times hereinafter mentioned, the plaintiff Betty Nobel was and still is the owner of record of premises known as 268 Beach 132nd Street, in Block 16265 as Lot 1 of Belle Harbor, Queens, New York, between Rockaway Beach Boulevard and Newport Avenue, in the same block as the aforesaid premises owned by the defendant Kimball Construction Co.Inc.

14. That on information and belief, at all the times hereinafter mentioned, the plaintiffs Saul Novak and Phyllis Novak were and still are the owners of record of premises known as 232 Beach 132nd Street, in Block 16265 as Lot 60 of Belle Harbor, Queens, New York, between Rockaway Beach Boulevard and Newport Avenue, in the same block as the aforesaid premises owned by the defendant Kimball Construction Co.Inc.

15. That on information and belief, the plaintiffs Leo Siegel and Pearl Siegel, at all the times hereinafter mentioned, were and still are the owners of record of premises known as 264 Beach 132nd Street, in Block 16265 as Lot 79 of Belle Harbor, Queens, New York, between Rockaway Beach Boulevard and Newport Avenue, in the same block as the aforesaid premises owned by the defendant Kimball Construction Co.Inc.

16. That on information and belief, at all the times hereinafter mentioned, the plaintiff Henry Jorgensen was and still is the owner of record of premises known as 180 Beach 132nd Street, in Block 16276 as Lot 87 of Belle Harbor, Queens, New York, between the beach front and Rockaway Beach Boulevard, in the block across the Boulevard from the aforesaid premises owned by the defendant Kimball Construction Co. Inc.

17. That on information and belief, at all the times hereinafter mentioned, the plaintiffs Arthur Upelnieks and Irmgard Upelnieks were and still are the owners of record of premises known as 132-16 Rockaway Beach Boulevard, situate in Block 16266 as Lot 46 of Belle Harbor, Queens, New York, on the corner of 132nd Street and Rockaway Beach Boulevard, directly across the street from the aforesaid premises owned by the defendant Kimball Construction Co. Inc.

18. That on information and belief, at all the times hereinafter mentioned, the plaintiffs Milton Zinar and Ruth Zinar were and still are the owners of record of premises known as 144 Beach 132nd Street, situate in Block 16276 as Lot 68 of Belle Harbor, Queens, New York, between the beach front and Rockaway Beach Boulevard, in the block across the Boulevard from the aforesaid premises owned by the defendant Kimball Construction Co. Inc.

19. That on information and belief, at all the times hereinafter mentioned, the plaintiff Leonard Savino was and still is the owner of record of premises known as 130-03

Rockaway Beach Boulevard, situate in Block 16275 as Lot 6 of Belle Harbor, Queens, New York, in a block on the Boulevard adjacent to the aforesaid premises owned by the defendant Kimball Construction Co.Inc.

20. That on information and belief,at all the times hereinafter mentioned, the plaintiff Ernestine Feinland was and still is the owner of record of premises known as 427 Beach 132nd Street, situate in Block 16255 as Lot 63 of Belle Harbor, Queens, New York, between Newport Avenue and Cranston Avenue, in a block adjacent to the block in which the aforesaid premises owned by the defendant Kimball Construction Co. Inc. are located.

21. That on information and belief, at all the times hereinafter mentioned, the plaintiffs John B. Geiselman,Jr. and Marguerite Geiselman were and still are the owners of record of premises known as 424 Beach 132nd Street, situated in Block 16254 as Lot 56 of Belle Harbor, Queens, New York, between Newport Avenue and Cranston Avenue, in a block adjacent to the block in which lie the aforesaid premises owned by the defendant Kimball Construction Co.Inc.

22. That on information and belief, at all the times hereinafter mentioned, the plaintiff Dorothy Inez Kraeger was and still is the owner of record of premises known as 416 Beach 132nd Street, situated in Block 16254 as Lot 50 of Belle Harbor, Queens,New York, between Newport Avenue and Cranston Avenue in a block adjacent to the block in which lie the aforesaid premises owned by the defendant Kimball Construction Co.Inc.

23. That on information and belief, at all the times hereinafter mentioned, the plaintiffs Leo Mackta and Regina Mackta were and still are the owners of record of premises known as 444 Beach 132nd Street, situated in Block 16254 as Lot 66 of Belle Harbor, Queens, New York, between Newport Avenue and Cranston Avenue, in a block adjacent to the block in which lie the aforesaid premises owned by the defendant Kimball Construction Co.Inc.

24. That on information and belief, at all the times hereinafter mentioned, the plaintiffs Francis Maloney and Kathleen Maloney, were and still are the owners of record of premises known as 432 Beach 132nd Street, situated in Block 16254 as Lot 59, of Belle Harbor, Queens, New York, between Newport Avenue and Cranston Avenue in a block adjacent to the aforesaid premises owned by the defendant Kimball Construction Co.Inc.

25. That on information and belief, at all the times hereinafter mentioned, the plaintiffs Jerome Nadel and Mildred Nadel were and still are the owners of record of premises known as 412 Beach 132nd Street, situated in Block 16254 as Lot 50 of Belle Harbor, Queens, New York, between Newport Avenue and Cranston Avenue, in a block adjacent to the block in which lie the aforesaid premises owned by the defendant Kimball Construction Co.Inc.

26. That on information and belief, at all the times hereinafter mentioned, the plaintiffs Kevin P. Wilkinson and Margaret Wilkinson were and still are the owners of

record of premises known as 425 Beach 132nd Street, situated in Block 16255 as Lot 29 of Belle Harbor, Queens, New York, between Newport Avenue and Cranston Avenue, in a block adjacent to the block in which lie the aforesaid premises owned by the defendant Kimball Construction Co.Inc.

27. That on information and belief, at all the times hereinafter mentioned, the plaintiffs Herbert Quell and Bridget Quell, were and still are the owners of record of premises known as 437 Beach 132nd Street, situated in Block 16255 as Lot 23 of Belle Harbor, Queens, New York, between Newport Avenue and Cranston Avenue, in a block adjacent to the aforesaid premises owned by the defendant Kimball Construction Co.Inc.

28. That on information and belief, at all the times hereinafter mentioned, the plaintiff Mildred Zoller was and still is the owner of record of premises known as 456 Beach 132nd Street, situated in Block 16254 as Lot 71 of Belle Harbor, Queens, New York, between Newport Avenue and Cranston Avenue, in a block adjacent to the block in which lie the aforesaid premises owned by the defendant Kimball Construction Co.Inc.

29. That on information and belief, at all the times hereinafter mentioned, the plaintiffs Mary King and Rita King were and still are the owners of record of premises known as 261 Beach 136th Strett, situated in Block 16270 as Lot 17 of Belle Harbor, Queens, New York, within several blocks from and, in the same zoning district as the aforesaid premises owned by the defendant Kimball Construction Co.Inc.

30. That heretofore and on or about December 15,1960 the Board of Estimate of the City of New York adopted a zoning resolution, effective December 15,1961, whereby the district wherein the aforesaid premises of the plaintiffs and the defendant Kimball Construction Co.Inc. are situate, were zoned as an R-2 district for single family detached residences only, as shown, as Zoning Map (30b) attached to said resolution.

31. That on information and belief, pursuant to the provisions of said zoning resolution, all owners of property claiming rights to continue pre-existing non-conforming uses of their property, for which legal certificates of occupancy had not yet been issued, had one year in which to obtain such certificates of occupancy.

32. That on information and belief, pursuant to said provisions, all owners failing to obtain such certificates of occupancy legalizing a non-conforming use were thereafter barred from asserting any rights to a non-conforming use.

33. That on information and belief, the building presently existing on the aforesaid premises known as 131-16 Rockaway Beach Boulevard, Belle Harbor, presently owned by the defendant Kimball Construction Co.Inc. is a wooden frame building and was constructed and erected in 1908 as a detached one family dwelling, in a zone limited at that time to such dwellings.

34. That on information and belief no certificate of occupancy for any use other than a one-family detached dwelling was ever issued, to date, for the aforesaid premises owned by the defendant Kimball Construction Co.Inc.

35. That on information and belief, upon acquiring the aforesaid premises known as 131-16 Rockaway Beach Boulevard, the former owners the Sisters of Reparation of the Congregation of Mary, Inc., and grantors to the present owner, the defendant Kimball Construction Co.Inc., used said premises from the time of acquiring same on June 14,1950 to the time of selling same on or about June 6,1972, as a religious institution or convent, and as a philanthropic non-profit institution and/or nursing home or sanitarium with sleeping accomodations known as the Regina Coeli Convent.

36. That on information and belief, the said former owners of the aforesaid premises, the Sisters of Reparation of the Congregation of Mary, Inc. applied for and received complete tax exemption, because of their use of said premises as a religious institution and convent, and as a philanthropic institution and/or nursing home for the entire period of their ownership thereof.

37. That by applying for and receiving a tax exemption as a religious institution and convent and as philanthropic institution and/or nursing home the former owner, the Sisters of Reparation of the Congregation of Mary, Inc. intentionally abandoned any rights to a different or prior classification of said premises, and said premises have thereby lost any con-conforming status that it might have had, or which it may be claimed to have had.

38. That the only use to which said premises known as 131-16 Rockaway Beach Boulevard, other than a religious institution or convent, and/or philanthropic non-profit institution and/or nursing home is the conforming use permitted under the present zoning law, towit, a detached one-family dwelling.

39. That the only use to which the said premises known as 131-16 Rockaway Beach Boulevard may be put by the present owner, the defendant Kimball Construction Co.Inc.

is that permitted by the zoning law, that of a detached one-family dwelling.

40. That on information and belief, heretofore and on or about the 30th day of June, 1972, the defendant Kimball Construction Co.Inc. filed plans and specifications with the Building Department of the City of New York and applied for permits to change the aforesaid premises known as 131-16 Rockaway Beach Boulevard, from an alleged non-conforming "Class B" Multiple Dwelling to a non-conforming "Class A" Multiple Dwelling and to alter said building and the adjoining garage to a building containing 12 separate apartment units for 12 families.

41. That on information and belief and shortly thereafter, the defendant Kimball Construction Co.Inc. filed an amended plan for said premises, calling for 14 separate apartments for 14 families and a 15th apartment for a superintendent.

42. That on information and belief, said premises were never a legal "Class B" Multiple dwelling.

43. That on information and belief, if said premises ever had any right to be classified a "Class B" Multiple dwelling, said right was lost by the intentional abandonment of same by the former owners, the Sisters of Reparation of the Congregation of Mary, Inc.

44. That heretofore and on or about November 8, 1972 the defendant, Erling Karlsen, building inspector for

the City of New York, County of Queens, approved said plans, and caused to be issued to said defendant Kimball Construction Co.Inc. a permit # 4665-alteration 688/72, for the alteration of said building and construction, in accordance with said plans and specifications and the amendment thereof.

45. That said permit is utterly illegal and void.

46. That on information and belief, the defendant Kimball Construction Co.Inc. is proceeding with the alteration and construction of said 14 apartments in said building pursuant to said plans and specifications and illegal permit.

47. That the plaintiffs, whose premises are adjacent to and in the vicinity of the said premises of the defendant Kimball Construction Co.Inc. are all within said R2 district, a will suffer irreparable loss unless the defendant Kimball Construction Co.Inc. is restrained by injunction from altering said frame building, pursuant to said plans, specifications and permit, contrary to the provisions of the zoning resolution; that said irreparable loss will consist of immediate and future depreciation in the value of the respective properties of the plaintiffs because of the change of character of the neighborhood by reason of the erection of a multiple dwelling immediately adjacent to and in the vicinity of plaintiffs' respective properties.

48. That the erection of 14 apartments in a frame dwelling with only one stairway and one exit as the plans indicate, in addition to being in violation of the zoning law,

is a very serious fire hazard to all prospective inhabitants of said dwelling and to the adjacent property owners, many of whose buildings are wooden frame structures and of similar vintage.

49. That in addition the creation of a building housing 14 separate families, will cause unwarranted congestion in the neighborhood, and an unwarranted burden on the neighborhood facilities.

50. That in addition the creation of a 14 family residence without any parking facilities, as required under the zoning law, will create congestion and a nuisance to the neighborhood property owners.

51. That by reason of all the foregoing, plaintiffs will be irreparably damaged.

52. That plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs ask judgment: (1) declaring that the altering of premises known as 131-16-Rockaway Beach Boulevard, Belle Harbor, Queens, New York, as set forth and in the plans and specifications filed by the defendant Kimball Construction Co.Inc. constitutes a violation of the zoning resolution adopted by the Board of Estimate of the City of New York, for the district in which said premises are located; (2) that the permit heretofore issued to said defendant Kimball Construction Co.Inc. on or about November 8,1972,permit # 4665-alt. #688/72 by the Building Department of the City of New York be vacated and declared null and void, and (3) that the defendant,

Kimball Construction Co.Inc., its agents, servants and/or employees be enjoined and restrained both permanently and pending the determination of this action, from altering the said building on premises known as 131-16 Rockaway Beach Boulevard, Belle Harbor, Queens, New York, and from constructing any apartments therein, pursuant to said permit, or pursuant to any other permits contrary to the provisions of the Zoning Resolution of the City of New York, which became law on December 15, 1961, and that plaintiffs have such other, further and different relief as may be just and equitable, together with the costs and disbursements of this action.

DORA ABERLIN,
Attorney for Plaintiffs
Office & P O Address
150 Nassau Street
New York, N.Y. 10038
227-8339

PETITION IN ARTICLE 78 PROCEEDING IN SUPREME COURT, QUEENS COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

- -

IRVING ELLENTUCK and MILDRED ELLENTUCK, MARK R. BRYCE and ROBERTA BRYCE, STUART HORNIN and BARBARA HORNIN, ELAINE FARKAS and JACK FARKAS, A. GERARD HYDE, NORMA MASKIN and ARTHUR MASKIN, SAUL NOVAK and PHYLLIS NOVAK, and LEONARD SAVINO, on their own behalf and on behalf of all other adjacent property owners who have filed objections with the Board of Standards and Appeals to the granting of the varicance which is the subject of this application for review,

Petitioners,

- against -

JOSEPH B. KLEIN, PHILIP AGUSTA, HOWARD B. HORNSTEIN, HENRY M. CARROLL and JOHN B. WALSH, as Commissioners constituting the Board of Standards and Appeals of the City of New York,

and

JEREMIAH T. WALSH, as Commissioner of Buildings of the City of New York and H. IRVING SIGMAN as Borough Superintendent of the Borough of Queens,

and

KIMBALL CONSTRUCTION CO. INC.,

Respondents.

- -

TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF QUEENS:

Petitioners above named by their attorney, Dora Aberlin, respectfully show to this Court and allege:

Respondent Board of Standards + Appeals

EXHIBIT H

1. On information and belief, at all the times hereinafter mentioned, the respondent, KIMBALL CONSTRUCTION CO. INC., was and still is a domestic corporation duly organized and existing under the laws of the State of New York.

2. That at all the time hereinafter mentioned, the respondents, JOSEPH B. KLEIN, PHILIP AGUSTA, HOWARD B. HORNSTEIN, HENRY M. CARROLL and JOHN B. WALSH are the Commissioners constituting the BOARD OF STANDARDS AND APPEALS of the City of New York.

3. That at all the times hereinafter mentioned, the respondent, JEREMIAH T. WALSH, was and now is the Commissioner of Buildings of the City of New York.

4. That at all the times hereinafter mentioned, the respondent, H. IRVING SIGMAN was and still is the Borough Superintendent for the Department of Buildings of the City of New York.

5. That the respondent, KIMBALL CONSTRUCTION CO. INC., is the owner of record of premises known as 131-16 Rockaway Beach Boulevard, situated in Block 162625, as Lot 45 on the corner of Rockaway Beach Boulevard and Beach 132nd Street, between Rockaway Beach Boulevard and Newport Avenue, in Belle Harbor, Borough of Queens, City and State of New York.

6. That the petitioners are residents of and owners of

property adjacent to and in the same zone with the property known as 131-16 Rockaway Beach Boulevard, in the Borough of Queens City and State of New York.

7. That pursuant to the provisions of the Zoning Resolution adopted by the Board of Estimate of the City of New York, effective December 15, 1961, the premises hereinabove described of the respondent, Kimball Construction Co. Inc., known as 131-16 Rockaway Beach Boulevard and the premises belonging to the petitioners herein are situated in an R-2 district zoned for single family detached residences only, as shown on zoning map (30b) attached to said resolution.

8. That heretofore and on or about November 3, 1972, the respondent, KIMBALL CONSTRUCTION CO. INC., obtained a building permit #4665 for alteration #638/72 from the Building Department of the City of New York, Borough of Queens, to alter the subject premises at 131-16 Rockaway Beach Boulevard , Belle Harbor, Queens in an R-2 district in violation of law to a Class A multiple dwelling to contain 14 apartments with 14 separate kitchens .

9. That thereupon, and on or about December 19, 1972, the petitioners above named and others also owning property in said district and zone, instituted an action in the Supreme Court, Queens County under Index # 15207-1972 to vacate said illegal permit and to enjoin the alteration of said subject premises

10. That on the 29th day of April, 1974, the Appellate Division of the Supreme Court, Second Department ruled that the said permit #4665 was null and void, and that the alteration proposed in Alteration # 688-1972 was illegal and the defendant, Kimball Construction Co. Inc. was permanently enjoined from further construction and from altering the premises to a Class A multiple dwelling. A copy of that decision and order is hereto attached, made part hereof and marked petitioners' exhibits 1 and 2.

11. That thereafter and on or about May 16, 1974, judgment in favor of the plaintiffs pursuant to said Appellate Division decision and order was duly entered in the office of the Clerk of the County of Queens, vacating said alteration permit and permanently enjoining the alteration of the subject premises to a Class A multiple dwelling. A copy of that judgment is attached hereto, made part hereof and marked Petitioners' Exhibit 3.

12. That during the pendency of said appeal, respondent Kimball Construction Co. Inc. had rushed completion of the illegal alteration and was successful in obtaining an alleged certificate of occupancy # Q 186733 for subject premises as an alleged Class A multiple dwelling, although the Borough Superintendent, respondent H. Irving Sigman chargeable with the issue of certificates of occupancy was himself part to that appeal.

13. That after the Appellate Division decision and the entry of judgment thereon in this Court, the respondent, Commissioner of Buildings, Jeremiah T. Walsh, ordered the respondent Borough Superintendent, H. Irving Sigman to forthwith comply with the order of the Appellate Division and to apply for a revocation of the certificate of occupancy #Q 106733 to the Board of Standards and Appeals. A copy of that directive dated May 17, 1974 is attached hereto made part hereof and marked Petitioners' Exhibit [illegible].

14. That thereafter and on or about June 11, 1974, respondent H. Irving Sigman did apply to the Board of Standards and Appeals for revocation of said certificate of occupancy in compliance with the order of the Appellate Division. A copy of that application is attached hereto, made part hereof and marked Petitioners' Exhibit 5.

15. That thereafter the Board of Standards and Appeals ordered a hearing on the issue of revocation of said Board calendar number #367-74A for July 17, 1974 and then at the request of respondent Sigman adjourned same to September 24, 1974.

16. That the respondent, Kimball Construction Co. Inc. was notified of the hearing, appeared at same with counsel and vigorously opposed revocation on the ground of hardship and practical difficulty in that he claimed to have spent considerable money to complete the illegal alteration, and submitted affidavits

mandates of the Appellate Division and the judgment of this Court, the aforesaid certificate of occupancy # Q 186733 was duly revoked by the Board of Standards and Appeals. A copy of that resolution and determination is attached hereto, made part hereof and marked Petitioners' Exhibit 6. No appeal or application for review from that determination was taken by respondent Kimball Construction Co. Inc.

18. That immediately thereafter and on or about October 3, 1974, respondent Kimball Construction Co. Inc., despite and in violation of the express permanent prohibition and injunction imposed by the Appellate Division against altering the subject building to a Class A multiple dwelling, filed a new application with the building department for a permit to alter and maintain said building as a Class A multiple under a new number, to wit Alteration # 1083-1974 seeking to maintain and keep the same alteration which the Appellate Division had forbidden.

19. That on information and belief and on or about October 8, 1974, said application for a new permit was denied by the Building Department in accordance with the determination of the Board of Standards and Appeals revoking the certificate of occupancy. A copy of that denial is attached hereto, made part hereof and marked Petitioners' Exhibit 7.

20. That on information and belief, on or about

and H. Irving Sigman, a violation of law was duly filed against the subject premises in that same was being illegally occupied as a Class A multiple dwelling, was served upon the respondent Kimball Construction Co. Inc and said respondent was ordered to vacate the building. A copy of that directive is attached hereto, made part herof and marked Petittione s' Exhibit 8.

21. That respondent Kimball construction Co. Inc., despite the mandates of the courts, the revocation of the certificate of occupancy and the violation and order to vacate the building, on information and belief, still maintains and operates said subject premises as a Class A multiple dwelling and has tenants living therein.

22. That thereafter and on or about October 23, 1974, respondent Kimball Construction Co. Inc., filed an appeal from the denial of his application for a new permit by the Building Department, with the Board of Standards and Appeals and made application for a variance to permit him to continue and maintain the subject premises as a Class A multiple dwelling. A copy of this application is attached hereto, made part hereof and marked Petitioners' Exhibit 9,

23. That the grounds set forth by said respondent in support of the application for a variance, to wit hardship and practical difficulty and the facts on which such claims are made are precisly the same as those set forth by this respondent

in opposing the revocation of the certificate of occupancy which the Board of Standards and Appeals had considered and resolved against this respondent.

24. The Board of Standards and Appeals has and had no jurisdiction or power to consider this application for a variance in that the Board has no jurisdiction or power to reverse its own decision except on new facts.

25. The Board of Standards and Appeals had no power or jurisdiction to entertain the said application for a variance in that the Appellate Division order expressly forbids and permanently enjoins the alteration of the subject building to a Class A multiple dwelling.

26. The Board of Standards and Appeals has and had no jurisdiction or power to entertain or consider this application for a variance in that, although it may permit a change from one non-conforming use to another non-conforming use under the zoning law, the Appellate Division had ruled and found as a fact that the subject premises for a period of about 20 years had been used for a conforming use and had lost its classification as a multiple B dwelling. Under the zoning law the Board has no power to permit a conforming use to be changed to a non-conforming use.

27. The Board of Standards and Appeals had and has no jurisdiction and power to consider the application for a variance because the issue of whether the building could be

be altered to a Class A multiple dwelling was res judicata and the issue could not be re-litigated.

28. The Board of Standards and Appeals has and had no jurisdiction or power to entertain or consider the application for a variance in that it is bound by the findings of fact made by the Appellate Division and may not sit as an Appellate Court over the Appellate Division or overule it.

29. That the subject building is a three story and basement frame building , about 68 years of age.

30. That the Board of Standards and Appeals has and had no power to consider or entertain this application for a variance in that the variance seeks to make a multiple dwelling of a frame building in violation of the express provisions of the multiple dwelling law and the public policy of this state. Sec. 666(6)-2.0 of the Administrative code of the City of New York specifically prohibits the Board from varying the provisions of the Multiple dwelling Law except as provided in Section 310 of the multiple dwelling law. Section 310 permits variations in frame buildings only as to very minor provisions of height and bulk, required open space and minimum dimensions of yards and courts. The Multiple dwelling law and the public policy of this state forbid more than two families in any frame building.

31. Despite the lack of jurisdiction and power in the

Board to grant such a variance, it nevertheless placed the matter on its calendar for/Hearing for January 28, 1975 under Calendar # 642-74 BZ

32. That pursuant to the rules of procedure of the Board of Standards and Appeals before the hearing could be held, the respondent applicant, Kimball Construction Co. Inc. was required to serve notice in person or by certified mail on all the property owners within a 400 foot radius from the center of the subject property.

33. That the records at the Board of Standards and Appeals and the return of service filed therein show that in many instances service of such notice by certified mail was not made to the owners within the 400 foot radius area, but to their mortgagees, and was defective.

34. That by reason of said defective service the Board never obtained jurisdiction of the subject matter.

35. That despite the defective service, on information and belief, about 83 residents and owners in the 400 foot area filed written objections/to the granting of the variance with the Board of Standards and Appeals, and about another 69 owners closely adjacent to the 400 foot area also filed written objections.

36. That hearings on the application for a variance were held by the Board on January 28, 1975, February 18, 1975, March 11, 1975 and on March 11, 1975 the hearings were closed and

37. That at said hearings the Board permitted the applicant, over petitioners' objection, to offer in evidence matters bearing on the issues that had been litigated in the Supreme Court action and which had resulted in fact findings by the Appellate Division and attemtpted to re-litigate the issue of whether the subject building was a Class B multiple dwelling at the time it was purchased by the respondent, Kimball Construction Co. Inc., although the Appellate Division had already found as a fact that it was not, and accepted wholly invalid and self serving documents as evidence which had no probative value whatsoever.

38. Under Sec. 200 , subdivision 5 and Sec. 666 subdivision 7 of the New York City Charter, the power of the Board of Standards and Appeals/is limited by the regulations to grant variances embodied in Sec. 72-21 of the zoning law .

39. Under Sec. 72-21 of the zoning law, the Board has no jurisdiction to grant variances unless it makes, based on probative evidence, each and every one of five different fact findings.

40. On March 25, 1975, the Board rendered its decision granting the variance and stating in its decision that it made each and every one of the required findings allegedly from evidence in the file. A copy of that decision is attached hereto

made part hereof and marked Petitioners' Exhibit 10.

41. That the findings made by the Board of Standards and Appeals after hearings at which evidence was taken are not on the entire record supported by substantial evidence.

42. That some of the findings so made by the Board, contradict the fact findings already made by the Appellate Division and would appear to overrule the Appellate Division.

43. The first mandatory requirment of Sec. 72-21 of the zoning law is that to succeed the applicant for a variance must show unique physical condition. This has been held under the cases to mean uniqueness in the lot itself, not uniqueness brought about by continued illegal construction under a void permit. There is no evidence of any probative value in the file to sustain such a finding.

44. The second mandatory requirement is economic hardship. To sustain such a finding the respondent Kimball Construction Co. Inc. offered in evidence self serving unaudited unsubstantiated claims of cost and steadfastly refused to produce bills, cancelled checks or contracts despite petitioners' request for same. There is no substantial evidence in the record to sustain such a finding.

45. The third mandatory requirement is that the requested variance may not alter the essential character of

that the alteration 'in any event" should not have been permitted because of the " dismal assessment thereof"by the respondent H. Irving Sigman and the character of the neighborhood. The Board of Standards and Appeals has no power to now overrule the Appellate division on a finding of fact. But even if the Appellate Division had not foreclosed further litigation on this item, there is no substantial evidence whatsoever in the file to show that such an alteration is in keeping with the character of the neighborhood.

46. The fourth mandatory requirement is that the variance requested must be the minimum needed to reduce the alleged hardship. The respondent , Kimball, offered in evidence utterly unsubstantiated figures and figures that varied with each hearing in an abortive attempt to show that he needed all the apartments he asked for to make a minimum return on his investment. Instead of showing a minimum return, applicant's own alleged unsubstatiated figures of alleged cost, showed that he would be making a maximum and very high return even on the grossly exaggerated claims of cost. Even the Board's reduction of one apartment does not make the variance minimum.

47. The last requirement mandated by the section is that the hardship forming the basis for the application may not be self - created. This applicant, despite the pendency of the litigation, chose to frustrate any attempt to stop his [illegible]

the litigation started to continue with the illegal construction, he did at his peril. He was on notice. He may not now complain of financial loss.

48. The variance granted by the Board of Standards and Appeals, violates the spirit as well as the letter of the zoning law and is violative of considerations of public safety.

49. The variance granted in a single family detached dwelling zone for a multiple dwelling with so many families is a drain upon the community facilities and will cause great plumbing and parking difficulties.

50. The variation was granted by the Board of Standards and Appeals by a vote of three for the variation, one against and one, the chairman abstaining. The Commissioners who voted for the variance are Philip Agusta, Henry M. Carroll, and John B. Walsh.

51. The said Commissioners, Philip Agusta, Henry M. Carroll and John B. Walsh, knowingly refused and failed to obey and enforce the order of the Appellate Division and the judgment of this Court entered thereon.

52. The said Commissioners by their neglect and failure to enforce the judgment of this Court and the order of the Appellate Division have impaired, impeded, defeated and prejudiced the rights of the petitioners.

53. The respondents, Philip Agusta, Henry M. Carroll and John B. Walsh by their actions in refusing and failing to honor and carry out the mandates and judgment of the Courts are guilty of contempt of Court.

54. That on information and belief, the respondent Kimabll Construction Co. Inc. has professed intention to forthwith apply for either a reinstatment of the vacated certificate of occupancy or a new one permitting the use of the subject building as a Class A multiple dwelling.

55. That the granting of such an illegal certificate of occupancy pending the hearing and determination of this proceed could cause complications and grave curtailing of petitioners' rights.

WHEREFORE, petitioners demand judgment

(1) Revoking and vacating the decision and determination of the Board of Standards and Appeals granting the variance to the respondent, Kimball Construction Co. to alter/or maintain the premises at 131-16 Rockaway Beach Boulevard, Belle Harbor , Queens, New York as a Class A multiple dwelling.

(2) Enjoining or restraining the respondents, Commissioner of Buildings, Jeremiah T. Walsh and Superintendent, H. Irving Bayman from reinstating the revoked certificate of occupancy herein or issuing a new one for the subject premises as a Class A multiple dwelling.

(3) Adjudging Commissioners Philip Agusta, Henry M. Carroll and John B. Walsh in contempt of Court.

(4) Pursuant to Section 7803 of the CPLR, subdivision 4 and Section 7804 CPLR subdivision (g) transferring the within proceedin to a term of the Appellate Division, Second Department for disposition on the ground that the determination of the Board of Standards and Appeals subject of this application for review was made as a result of hearings held and at which evidence was taken and is not supported on the entire record by substantial evidence;

... and for such other, further and different relief as may be just in the premises, together with the costs and disbursements of this proceedings.

Mark R Bruce

MARK R, BRUCE, Petitioner

DORA ABERLIN
Attorney for Petitioners
Office & P.O. Address
150 Nassau Street
New York, New York 10038

Tel. - Da-7-8339

BOROUGH SUPT.'S MEMO TO COMMISSIONER STEIN

Intradepartmental Memorandum

Commissioner Joseph Stein — Date: December 6, 1972

m: H.I. Sigman, Borough Superintendent, Queens — Subject: 131-16 Rockaway Beach Blvd., Queens
Alteration Application no. 658/72

erence is made re your request for report dated November 24, 1972, and ephone call from Director of Operations T.V. Burke regarding the same mises.

complainant, Mr. Charles H. Fier, representing the Belle Harbor Property ers' Association, Inc., had arranged for a meeting to be held in my office Friday, December 8th, and I thought it advisable to meet with Mr. Fier and delegation to explain the position of the Department of Buildings, before mitting this report.

Charles H. Fier, attorney, together with 13 members of the Civic Association, sented arguments and raised questions relative to the approval of the above ted application. It was explained to the delegation that the plans and lication were approved in accordance with the requirements of this Department, evidence was made available to them regarding the basis for this approval.

above stated premises is presently in an R-2 district.

records of this Department indicate that the dwelling was accepted as a ss "B" multiple dwelling since 1945 and recorded as such in the records of Department of Rent and Housing Maintenance (Refer to Exhibit "A").

1950 Alteration no. 2918/50 was filed to do minor work, but the use and cupancy of the structure, in accordance with the specification sheet filed, ain the same (Refer to Exhibit "B").

sed upon departmental memorandum dated December 17, 1968-subject, "Residential Zoning Resolution Change of Occupancy-Class "B" Multiple Dwelling to Class " Multiple Dwelling", the application was approved permitting the Class "B" its to be changed to Class "A" apartments in an R-2 district (Refer to Exhibit "). Furthermore, the number of Class "A" units was limited to four families on floor, in accordance with item 10-B of the Borough Superintendents' meeting December 18, 1946 (Refer to Exhibit "D") which is accepted procedure.

egress requirements for this structure comply with the requirements of ction 18 subdivision 1(b) of the Multiple Dwelling Law. In accordance with the ltiple Dwelling Law, Section 194, the sprinkler system need not be extended to apartment and is required only in the public halls (Section 187).

is the opinion of this office that the plans and application are properly ap- oved. Although the resulting condition is an undesirable one, it is a matter er which we have no control. Firstly, the neighborhood is zoned for one family sidences, and as such is not in harmony with the environment; and secondly, the quirement set forth the Multiple Dwelling Law for fire protection appears to be t a bare minimum for protection of occupants.

a copy of this report to Mr. Fier, his letter of November 17, 1972 is being nswered.

Respectfully submitted,
s/ H.I. Sigman
H.I. Sigman
Borough Superintendent
Department of Buildings-Queens

opy to Director of Operations
T.V. Burke

99A

COMMISSIONER OF BUILDINGS WALSH'S DIRECTIVE TO SIGMAN DATED MAY 17, 1974

HOUSING AND DEVELOPMENT ADMINISTRATION

DEPARTMENT OF BUILDINGS

DEPARTMENTAL MEMORANDUM

DATE: May 17, 1974

TO: Borough Superintendent Sigman, P.E.

FROM: Jeremiah T. Walsh, P.E., Commissioner

SUBJECT: Order of Appellative Division of the Supreme Court; Alt. 688/72; 131-16 Rockaway Beach Blvd., Queens.

Your memorandum of May 15, 1974 and the court order relating to the subject application and premises have been reviewed.

Since the court on April 20, 1974 directed that the alteration is illegal and the permit is vacated; and, the certificate of occupancy had already been issued on March 13, 1974 pursuant to said alteration; you are directed to forthwith file an application with the Board of Standards & Appeals to revoke certificate of occupancy #Q186733.

Jeremiah T. Walsh, P.E.
Commissioner

367 74 A

Exhibit #5

100A

SIGMAN'S LETTER TO BOARD OF STANDARDS AND APPEALS DATED JUNE 11, 1974

367 74 A

RECEIVED
'74 JUN 17 PM 3:15
CAL. NO.

June 11, 1974

Honorable Joseph B. Klein, Chairman
Board of Standards & Appeals
80 Lafayette Street
New York, New York 10013

Re: Certificate of Occupancy No. Q 186 733
131-16 Rockaway Beach Boulevard
Rockaway Park, Queens

Dear Sir:

It is respectfully requested that Certificate of Occupancy No. Q 186 733 be revoked.

This request is in compliance with an order of the Appellate Division of the Supreme Court, relative to Alteration #608/72. A copy of this order is enclosed.

For the convenience of the Board, copies of previous correspondence relative to these premises, relevant department memos and decisions, and a previous decision by the Supreme Court are submitted herewith.

Very truly yours,

H. Irving Sigman
Borough Superintendent
Department of Buildings, Queens

HIS
acmm
Encls.

Plaintiffs' Exhibit 6

62

101 A

SIGMUND'S LETTER TO BOARD OF STANDARDS AND APPEALS DATED JUNE 18, 1974

HOUSING AND DEVELOPMENT ADMINISTRATION
ROGER STARR, Administrator, (Temp.)

Department of Buildings
100 GOLD STREET, NEW YORK, N. Y. 10038

JEREMIAH T. WALSH, P.E., Commissioner

Manhattan
MUNICIPAL BUILDING
NEW YORK, N. Y. 10007
The Bronx
1932 ARTHUR AVENUE
BRONX, N. Y. 10457
Brooklyn
MUNICIPAL BUILDING
BROOKLYN, N. Y. 11201
Queens
126-06 QUEENS BLVD.
KEW GARDENS, N. Y. 11415
Richmond
BOROUGH HALL
ST. GEORGE, N. Y. 10301

Corr #1051/74

June 18, 1974

Joseph B. Klein, Chairman
Board of Standards and Appeals
80 Lafayette Street
New York, New York 10013

Re: Calendar No. 367/74-A
131-16 Rockaway Blvd., Queens

Dear Sir:

I have a request for expeditious processing of the above case from the owner, which I am forwarding to you.

In view of the circumstances of the case, and the severe hardship imposed on the owner, I concur with his request for an expedite.

Very truly yours,

H. Irving Sigman
Borough Superintendent
Department of Buildings, Queens

HIS
ae:sn

Mr Jacono
Please expedite

RECEIVED
1974 JUN 18 PM 2:00
BOARD OF STANDARDS & APPEALS
CAL. NO.

Plaintiffs' Exhibit 7

LETTER DATED SEPTEMBER 4, 1974 FROM CORPORATION COUNSEL RE VACATING CERTIFICATE OF OCCUPANCY

September 4, 1974

H. Irving Sigman, P.E.
Borough Superintendent, Queens
Dept. of Buildings
City of New York
126-06 Queens Blvd.
Kew Gardens, New York 11415

Re: Ellentuck et al.,
v. Stein et al.,

Dear Mr. Sigman:

I have discussed with Joseph Halpern, Chief of the Penalties Division of the Law Department, the application made by your office to the Board of Standards and Appeals to revoke the certificate of occupancy for the premises 131-16 Rockaway Beach Boulevard, Queens. Mr. Halpern and I both feel strongly that you should proceed forward vigorously with the application on September 24, 1974, the date of the Board's hearing of this application.

Thank you for your kind cooperation in this matter.

Very truly yours,

s/ I. L. B.

IRA L. BLANKSTEIN
Assistant Corporation Counsel

cc:

Dora Aberlin, Esq.
Attorney for Plaintiff
150 Nassau Street
New York, New York 10038

Exhibit 8

64

LETTER OF BOARD OF STANDARDS AND APPEALS DATED OCTOBER 1, 1974

dated ~~10/1/74~~ is hereby filed by the Board of Standards & Appeals.

Meeting of 10/1/74 Date: 10/2/74 Page -

Cal. No. 367-74-A John B Cincotta

Premises: 131-16 Rockaway Beach Boulevard

ACTION OF BOARD - Appeal granted on condition.

WHEREAS, the premises were inspected by a committee of the Board which recommended that the appeal be granted under certain conditions.

~~Borough Superintendent~~ Appellate Division ~~Commissioner~~,

Resolved, that the order and decision of the ~~Borough Superintendent~~, dated May 17, 1974

acting on Alt. Applic. 688/72 Objection No.

Certificate of occupancy

be and it hereby is ~~modified~~ sustained and that the ~~appeal be and it hereby is granted~~ is hereby revoked.

October 2, 1974

I certify that this is a true copy of resolution Cal # 367-74A adopted by the Board of Standards at a regular hearing held on October 1, 1974

John B Cincotta

JOHN B. CINCOTTA
EXECUTIVE DIRECTOR

Plaintiffs' Exhibit 9.

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104A

DIRECTIVE BY COMMISSIONER WALSH TO SIGMAN
DATED OCTOBER 9, 1974

October 9, 1974

Borough Superintendent Sigman, P.E.

Jeremiah T. Walsh, P.E., Commissioner

131-16 Rockaway Beach Blvd., Queens; Alt. 688/72; D.S. & A. Cal. No. 367-74 A.

Herewith forwarded is a copy of correspondence received indicating that certificate of occupancy #0 106739 has been revoked by the Board of Standards & Appeals under the subject calender number, as a consequence of an order of the Appellate Division of the Supreme Court.

Have an inspection made; and, if the premises are occupied as a Class A multiple dwelling, have a violation placed for illegal occupancy, as well as referring a copy of your violation to the Office of Code Enforcement of the Department of Rent and Housing Maintenance for appropriate action by that agency.

JTW:IEM:njk

Jeremiah T. Walsh, P.E.
Commissioner

cc: Dep. Comm. Dell'Aria
Office of Code Enforcement
Dep. Comm. Jenkins
Ass't Comm. Parascandola
Exec. Staff
Dora Aberlin

Plaintiffs' Exhibit 40

9/8/75 City Planning Commission

REF

EXCERPTS FROM ZONING LAW OF THE CITY OF NEW YORK

Article VII

Administration

Chapter 1 Enforcement and Administration

71-0 ENFORCEMENT AND ADMINISTRATION

The Commissioner of the Department of Buildings shall administer and enforce this resolution, except as otherwise specifically provided in the New York City Charter and in this resolution.

The Department of Air Pollution Control shall have exclusive jurisdiction to administer and enforce all provisions of this resolution relating to air pollution, specifically including the performance standards regulating *smoke*, *dust* and other *particulate matter*, odorous matter, and *toxic or noxious matter* emitted into the atmosphere, in accordance with rules and regulations adopted by the Board of Air Pollution Control.

Chapter 2 Interpretations and Variances

72-00 POWERS OF THE BOARD OF STANDARDS AND APPEALS

72-01

General Provisions

The Board of Standards and Appeals (referred to hereinafter as the Board) shall have the power, pursuant to the provisions of the New York City Charter and of this resolution, after public notice and hearing:

(a) To hear and decide appeals from and to review interpretations of this resolution;

(b) To hear, decide, and determine, in a specific case of practical difficulties or unnecessary hardship, whether to vary the application of the provisions of this resolution;

(c) To hear and decide applications for such special permits as are set forth in this resolution and are more specifically enumerated in Section 73-01 (General Provisions); and

(d) To adopt, amend, or repeal such rules or regulations as may be necessary to carry into effect the provisions of this resolution.

72-10 APPEALS FOR INTERPRETATION

72-11

General Provisions

The Board shall hear and decide appeals from or may, on its own initiative, review any rule or regulation, order, requirement, decision, or determination of the Commissioner of Buildings, of any duly authorized officer of the Department of Buildings, or of the Commissioner of any agency which, under the provisions of the New York City Charter, has jurisdiction over the *use* of land or over the *use* or *bulk* of *buildings or other structures*, subject to the requirements of this resolution.

On such an appeal or review, the Board may reverse, affirm, in whole or in part, or modify, such rule, regulation, order, requirement, decision, or determination and may make such rule, regulation, order, requirement, decision, or determination as in its opinion should have been made in the premises in strictly applying and interpreting the provisions of this resolution, and for such purposes the Board shall have the power of the officer from whose ruling the appeal or review is taken.

However, there shall be no appeal to or review by the Board from an interpretation of this resolution made by the Board of Air Pollution Control of the Department of Air Pollution Control, or any other agency for which the New York City Charter establishes a board empowered to adopt rules and regulations for such agency.

72-12

Street Layout Varying from Maps

Where the street layout actually on the ground varies from the street layout as shown on the *zoning maps*, the designation as shown on such maps shall be applied by the Board, after public notice and hearing, in such a way as to carry out the intent and purpose of this resolution.

72-20 VARIANCES

72-21

Findings Required for Variances

When in the course of enforcement of this resolution, any officer from whom an appeal may be taken under the provisions of Section 72-11 (General Provisions) has applied or interpreted a provision of this resolution, and there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such provision, the Board may, in accordance with the requirements set forth in this Section, vary or modify the provision so that the spirit of the law shall be observed, public safety secured, and substantial justice done.

Where it is alleged that there are practical difficulties or unnecessary hardship, the Board may grant a variance in the application of the provisions of this resolution in the specific case, provided that as a condition to the grant of any such variance, the Board shall make each and every one of the following findings:

(a) That there are unique physical conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to and inherent in the particular *zoning lot*; and that, as a result of such unique physical conditions, practical difficulties or unnecessary hardship arise in complying strictly with the *use* or *bulk* provisions of the resolution; and that the alleged practical difficulties or unnecessary hardship are not due to circumstances created generally by the strict application of such provisions in the neighborhood or district in which the *zoning lot* located.

Plaintiffs' Exhibit 11

72-21 (Continued)

(b) That because of such physical conditions there is no reasonable possibility that the *development* of the *zoning lot* in strict conformity with the provisions of this resolution will bring a reasonable return, and that the grant of a variance is therefore necessary to enable the owner to realize a reasonable return from such *zoning lot*. This finding shall not be required for the granting of a variance to a non-profit organization.

(c) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the *zoning lot* is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.

(d) That the practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner or by a predecessor in title. Where all other required findings are made, the purchase of a *zoning lot* subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.

(e) That within the intent and purposes of this resolution the variance, if granted, is the minimum variance necessary to afford relief; and to this end, the Board may permit a lesser variance than that applied for.

It shall be a further requirement that the decision or determination of the Board shall set forth each required finding in each specific grant of a variance, and in each denial thereof which of the required findings have not been satisfied. In any such case, each finding shall be supported by substantial evidence or other data considered by the Board in reaching its decision, including the personal knowledge of or inspection by the members of the Board. Reports of other City agencies made as a result of inquiry by the Board shall not be considered hearsay, but may be considered by the Board as if the data therein contained were secured by personal inspection.

72-22

Conditions or Restrictions

The Board may prescribe such conditions or restrictions applying to the grant of a variance as it may deem necessary in the specific case, in order to minimize the adverse effects of such variance upon other property in the neighborhood. Such conditions or restrictions shall be incorporated in the building permit and certificate of occupancy. Failure to comply with such conditions or restrictions shall constitute a violation of this resolution, and may constitute the basis for denial or revocation of a building permit or certificate of occupancy and for all other applicable remedies.

72-23

Lapse of Variances

A variance granted under the provisions of this resolution shall automatically lapse if substantial construction, in accordance with the plans for which such variance was granted, has not been completed within one year from the date of granting such variance by the Board, or, if judicial proceedings to review the Board's decision shall be instituted, from the date of entry of the final order in such proceedings, including all appeals.

Chapter 3 Special Permits by the Board of Standards and Appeals

73-00 SPECIAL PERMIT USES AND MODIFICATIONS

73-01 General Provisions

In harmony with the general purpose and intent of this resolution and in accordance with the provisions set forth in this Chapter, the Board may, in an appropriate case:

(a) Grant special permits for specified *uses* in specific districts (referred to hereinafter as special permit *uses*);

(b) Permit specified modifications of the *use* or *bulk* regulations of this resolution;

(c) Permit the renewal of revoked building permits as provided in Sections 11-31 to 11-33, inclusive, relating to Building Permits Issued before Effective Date of Resolution or Amendment; or

(d) Permit the renewal of a variance, exception, or permit issued by the Board prior to the effective date of this resolution, in accordance with the provisions of Section 11-41 relating to Exceptions, Variances, or Permits Previously Authorized;

provided that, in each specific case, the requirement for findings as set forth in this Chapter (or in the Sections referred to in (c) or (d) of this Section) shall constitute a condition precedent to the grant of such special permit, modification, or renewal.

In addition to meeting the requirements, conditions, and safeguards prescribed by the Board as set forth in this Chapter, each such special permit *use* shall conform to and comply with all of the applicable district regulations on *use*, *bulk*, supplementary *use* regulations, regulations applying along district boundaries, *accessory signs*, *accessory* off-street parking and off-street loading, and all other applicable provisions of this resolution, except as otherwise specifically provided in this Chapter or as they may be modified in accordance with (b) of this Section. In the case of required *accessory* off-street parking, such *use* shall satisfy the requirements specified for such *uses* in Sections 25-31, 36-21, or 44-21 (General Provisions) except that, where no parking requirement is specified therein, such *use* shall satisfy the requirements set forth in this Chapter.

Italicized words are defined in Section 12-10.

1109

Article V
Non-Conforming Uses and Non-Complying Buildings

Chapter 1 Statement of Legislative Intent

51-00 PURPOSE OF REGULATIONS GOVERNING NON-CONFORMING USES AND NON-COMPLYING BUILDINGS

The zoning districts established in this resolution (as set forth in the district regulations in Articles II, III, and IV and on the zoning maps) are designed to guide the future use of the City's land by encouraging the development of desirable residential, commercial, and manufacturing areas with appropriate groupings of compatible and related uses and thus to promote and to protect public health, safety, and general welfare.

As a necessary corollary, in order to carry out such purposes, non-conforming uses which adversely affect the development of such areas must be subject to certain limitations. The regulations governing non-conforming uses set forth in this Chapter are therefore adopted in order to provide a gradual remedy for existing undesirable conditions resulting from such incompatible non-conforming uses, which are detrimental to the achievement of such purposes. While such uses are generally permitted to continue, these regulations are designed to restrict further investment in such uses, which would make them more permanent establishments in inappropriate locations.

In the case of a few objectionable non-conforming uses which are detrimental to the character of Residence Districts, a reasonable statutory period of life is established for such uses, in order to permit the owner gradually to make his plans for the future during a period when he is allowed to continue the non-conforming use of his property, thereby minimizing any loss, while at the same time assuring the public that the district in which such non-conformity exists will eventually benefit from a more nearly uniform character.

In the case of buildings not complying with the bulk regulations of this resolution, the regulations governing non-complying buildings set forth in this Chapter are adopted in order to permit the appropriate use of such buildings but to prevent the creation of additional non-compliances or increases in the degree of existing non-compliances.

These regulations are thus designed to preserve the character of the districts established in this resolution in the light of their particular suitability to particular uses, and thus to promote the public health, safety, and general welfare.

Chapter 2 Non-Conforming Uses

52-00 DEFINITIONS AND GENERAL PROVISIONS

52-01 Definitions (repeated from Section 12-10)

Alterations, incidental, or to alter incidentally

"Incidental alterations" are:

(a) Changes or replacements in the non-structural parts of a *building or other structure*, without limitation to the following examples:

(1) Alteration of interior partitions to improve livability in a *non-conforming residential building*, provided that no additional *dwelling units* are created thereby.

(2) A minor addition on the exterior of a *residential building*, such as an open porch

(3) Alteration of interior non-load-bearing partitions in all other types of *buildings or other structures*

(4) Replacement of, or minor changes in, capacity of utility pipes, ducts, or conduits; or

(b) Changes or replacements in the structural parts of a *building or other structure*, limited to the following examples or others of similar character or extent:

(1) Making windows or doors in exterior walls

(2) Replacement of *building* facades

(3) Strengthening the load-bearing capacity, in not more than 10 percent of the total *floor area*, to permit the accommodation of a specialized unit of machinery or equipment

To "alter incidentally" is to make an *incidental alteration*.

Designed for residential use

A [illegible] designed for residential use" is a [illegible] which was originally designed for residential use and in which at least 75 percent of the floor area is occupied for residential [illegible]

Enlargement, or to enlarge

An "enlargement" is an addition to the *floor area* of an existing *building*, an increase in the size of any other structure, or an increase in that portion of a tract of land occupied by an existing *use*.

To "enlarge" is to make an *enlargement*

Extension, or to extend

An "extension" is an increase in the amount of existing *floor area* used for an existing *use*, within an existing *building*.

To "extend" is to make an *extension*.

Italicized words are defined in Section 12-10

52-01 (Continued)

Land with minor improvements

"Land with minor improvements" is a tract of land which:

(a) Does not involve any *building or other structure*; or

(b) Involves *buildings or other structures*, or other improvements, located underground or substantially at ground level, with a total assessed valuation, excluding land, of less than $2,000 as determined from the assessment rolls in effect on the applicable date on which such *use* is changed, damaged or destroyed, or to be terminated, in accordance with the provisions of Sections 52-32, 52-52, or 52-72 (Land with Minor Improvements).

Non-conforming, or non-conformity

A "non-conforming" *use* is any lawful *use*, whether of a *building or other structure* or of a tract of land, which does not conform to any one or more of the applicable *use* regulations of the district in which it is located, either on the effective date of this resolution or as a result of any subsequent amendment thereto.

A *non-conforming use* shall result from failure to conform to the applicable district regulations on either permitted Use Groups or performance standards.

A "non-conformity" is a failure by a *non-conforming use* to conform to any one of such applicable *use* regulations.

However, no existing *use* shall be deemed *non-conforming*, nor shall a *non-conformity* be deemed to exist, solely because of any of the following:

(a) The existence of less than the required *accessory* off-street parking spaces or loading berths; or

(b) The existence of *non-conforming accessory signs*; or

(c) The existence of conditions in violation of the provisions of either Sections 32-41 and 32-42, relating to Supplementary Use Regulations, or Sections 32-51 and 32-52 relating to Special Provisions Applying along District Boundaries, or Sections 42-41, 42-42, 42-44 and 42-45, relating to Supplementary Use Regulations and Special Provisions Applying along District Boundaries

52-10 CONTINUATION OF NON-CONFORMING USE

52-11

General Provisions

A *non-conforming use* may be continued, except as otherwise provided in this Chapter.

52-20 REPAIRS OR ALTERATIONS

52-21

Repairs and Incidental Alterations

Repairs to both structural and non-structural parts or *incidental alterations* may be made in a *building or other structure* substantially occupied by a *non-conforming use*, or in connection with a permitted change or *extension* of a *non-conforming use*.

52-22

Structural Alterations

No structural alterations shall be made in a *building or other structure* substantially occupied by a *non-conforming use*, except when

(a) In order to comply with [illegible] law, or

(b) In order to accommodate a conforming use or

(c) In order to conform to the applicable district regulations on performance standards, or

(d) In the course of an *enlargement* permitted under the provisions of Sections 52-41 to 52-43, inclusive, relating to Enlargements or Extensions,

or except as set forth in Sections 52-81 to 52-83, inclusive, relating to Regulations Applying to Non-Conforming Signs

---

Italicized words are defined in Section 12-10.

52-30 CHANGE OF NON-CONFORMING USE

52-31

General Provisions

For the purposes of this Chapter, a change of *use* is a change to another *use* listed in the same or any other Use Group; however, a change in ownership or occupancy shall not, by itself, constitute a change of *use*.

A *non conforming use* may be changed to any conforming *use*, and the applicable district *bulk* regulations and *accessory* off-street parking requirements shall not apply to such change of *use* or to alterations made in order to accommodate such conforming *use*, but shall apply to any *enlargement*.

A *non-conforming use* may be changed to another *non-conforming use* only in accordance with the provisions of this Chapter.

Any such change of *use* permitted by this Chapter shall conform to the applicable district regulations on *accessory* off-street loading berths as set forth in Section 52-41 (General Provisions) and on *accessory signs*, except that in Residence Districts such change shall conform to the regulations on *accessory signs* applicable in a C1 District.

52-32

Land with Minor Improvements

In all *Residence* and *Commercial Districts*, a *non-conforming use* of *land with minor improvements* may be changed only to a conforming *use*.

52-33

Manufacturing or Related Uses in Residence Districts

52-331

Buildings designed for residential use

In all *Residence Districts*, a *non-conforming use* listed in Use Group 11A, 16, 17, or 18 which is located in a *building designed for residential use* may be changed only to a *use* permitted in *Residence Districts*.

DECISION OF BOARD OF STANDARDS AND APPEALS DATED MARCH 25, 1975

PETITIONER'S EXHIBIT "4" 113A March 26, 1975

G-72-21-1M-311058(71)

I certify that this is a true copy of Resolution Cal # 642-74BZ as adopted by the Board of Standards and Appeals at a regular Public Hearing held on March 25, 1975

John B. Cincotta
JOHN B. CINCOTTA
EXECUTIVE DIRECTOR

DATE: 3/25/75

CAL. NO. 642-74-BZ

PREMISES: 131-16 Rockaway Boulevard, Queens.

ACTION OF BOARD - Application granted on condition.

WHEREAS, the premises and surrounding area were inspected by a committee of the Board; and

WHEREAS, the Board has determined that the evidence in the record supports the findings required to be made under Section 72-21 of the Zoning Resolution, and that the applicant is therefore entitled to relief on the grounds of practical difficulty and/or unnecessary hardship.

Resolve that the Board of Standards and Appeals does hereby make each and every one of the required findings and grants a variation in the application of the Zoning Resolution, and that the application be and it hereby is granted under Section 72-21 of the Zoning Resolution, to permit in an R2 district, the maintenance of an existing four-story building as a multiple dwelling, on condition that all work shall substantially conform to drawings filed with this application, marked "Received October 25, 1974", 11 sheets, and "March 5, 1975", one sheet; on further condition that the occupancy be limited to eleven (11) dwelling units plus one caretaker's apartment; and that all laws, rules and regulations applicable be complied with, and that substantial construction be completed within one year from the date of this resolution.

Plaintiffs' Exhibit 2

7

JUDGE LERNER'S ORDER DATED OCTOBER 31, 1975

At a Special Term Part 1 of the Supreme Court of the State of New York, held in and for the County of Queens, at the Courthouse, 66-11 Sutphin Boulevard, Jamaica, Queens, New York on the 31st day of October, 1975.

P R E S E N T:

HONORABLE ALFRED D. LERNER,

Justice

- -

IRVING ELLENTUCK et al.,

Petitioners,

Index # 3754-1975

- against -

JOSEPH B. KLEIN et al as Commissioners constituting the BOARD OF STANDARDS AND APPEALS of the CITY OF NEW YORK,
and
JEREMIAH T. WALSH as Commissioner of Buildings of the City of New York and H. IRVING SIGMAN as Borough Superintendent of the Borough of Queens,
and
KIMBALL CONSTRUCTION CO. INC.,

Respondents.

- -

The petitioners above named, having brought the within proceeding to review and annul the determination of the Board of Standards and Appeals dated March 25, 1975, under Board Calendar No. 642-74-BZ granting a variance to the respondent, Kimball Construction Co. Inc., permitting the alteration of premises owned

Plaintiffs' Exhibit 13

by the said Kimball Construction Co. Inc and known as 131-16 Rockaway Beach Boulevard, Belle Harbor, Queens, New York, to a Class A multiple dwelling, and to permanently enjoin the issuance or restoration of a certificate of occupancy for said premises as a Class A multiple dwelling, and the petitioners having moved by order to show cause dated March 27, 1975 for a stay of the implementation of said determination of the Board of Standards and Appeals pending the hearing and determination of the within proceeding and a stay pending the hearing having been granted by Mr. Justice Frank D. O'Connor on the 27th day of March, 1975, and said stay having been continued by order of Mr. Justice John J. Leonally on April 9, 1975. and by written order dated June 12, 1975, and the petitioners having moved by separate motion dated June 20, 1975 for an order revoking and vacating the decision and determination of the Board of Standards and Appeals herein, dated March 25, 1975, on the ground that said Board was without jurisdiction to make said determination in that said determination in effect overturned and vacated a prior decision of the Appellate Division permanently enjoining the alteration of the subject premises to a [illegible] dwelling, or in the alternative transferring the within proceeding to the Appellate Division, Second Department, and said petitioners' motion having duly come on to be heard on the 8th day of September,

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1975, and Dora Aberlin, appearing and arguing on behalf of the petitioners, and Sheldon Lobel, Esq. appearing and arguing for the respondent, Kimball Construction Co. Inc., and W. Bernard Richland, appearing and arguing for the other respondents, and due deliberation having been had, and the Court on oral argument having ordered the continuance of the stay pending determination of said motion and proceeding, and having on October 14, 1975 rendered and filed its written decision and opinion,

NOW, on reading and filing the order to show cause dated March 27, 1975, the affirmation of Dora Aberlin, duly signed the 26th day of March, 1975, the petition of Irving Ellenbuck et al, duly verified the 26th day of March, 1975, by Mark Bryce, one of the petitioners herein, and the exhibits attached to said petition, and the order of Mr. Justice Leary dated June 2, 1975, and the notice of motion dated June 16, 1975, the affirmation of Dora Aberlin, duly signed the 16th day of June, 1975, the reply affirmation of Dora Aberlin, duly signed the 23rd day of July, 1975, the second reply affirmation of Dora Aberlin, duly signed the 6th day of August, 1975, the petitioners' reply to the answer of respondents, duly verified the 3rd day of September, 1975, and the affirmation of Dora Aberlin attached thereto duly signed the 4th day of September, 1975, all in support of said motion and proceeding, and on reading and filing the affirmation of Sheldon Lobel, Esq., attorney for respondent Kimball Construction Co. Inc., duly signed

the 8th day of April, 1975, the affidavit of Marie A. Kimball, duly sworn to the 9th day of April, 1975, the answer of the respondent Kimball Construction Co. Inc., duly verified the 2nd day of July, 1975, and the affirmation of Sheldon Lobel, duly signed the 2nd day of July, 1975, and the answer and return of the respondents, Joseph B. Klein, Philip Agusta, Howard B. Hornstein, Henry M. Carroll and John B. Walsh, as Commissioners constituting the Board of Standards and Appeals of the City of New York, Jeremiah T. Mills as Commissioner of Buildings of the City of New York and H. Irving Sigman as Borough Superintendent of the Borough of Queens, verified the 6th day of August, 1975 by John J. Walsh, one of the Commissioners, and the transcript of the Board of Standards and Appeals record attached to the return, and the affirmation of Angelo Aloso, duly signed the 6th day of August, 1975, all in opposition to the petition and petitioners' motion, and upon reading and filing the decision and opinion of the Court dated October 14, 1975 and the minutes of the argument on September 8, 1975, it is

ORDERED that pursuant to the provisions of CPLR 7804 (g) the within proceeding be and the same hereby is transferred to the Appellate Division, Second Department for disposition; and it is further

ORDERED that pending said transfer and disposition by the Appellate Division, the stay and restraining order heretofore

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granted and issued herein, be and the same hereby is continued and the respondents be and they hereby are stayed and restrained from executing or implementing the decision ~~and~~ or determination or resolution of the Board of Standards and Appeals dated March 25, 1975, of which review ~~and annulment~~ is here sought, or from any further construction on the premises or from applying for ~~and~~/or obtaining, ~~and~~/or issuing another certificate of occupancy ~~for the premises or restoring the one heretofore revoked~~, purporting to validate the alteration of ~~and the occupancy~~ of the subject building to ~~or as a~~ Class A multiple dwelling.

E N T E R

Granted Nov. 31, 1975 John J. Durante Clerk

A. D. L.

JUSTICE OF THE SUPREME COURT

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LETTER DATED JANUARY 27, 1975
BY RICHMOND HILL SAVINGS BANK TO BOARD

[Letterhead of Richmond Hill Savings Bank, 118-20 Jamaica Avenue, Richmond Hill, N.Y. 11410 (212) 847-0100.]

CAL. NO.

January 27, 1975

Board of Standards and Appeals
80 Lafayette Street
New York, N.Y.

Dear Sirs:

Re: Loan No. 25600-Richmond Hill Savings Bank
Kimball Construction Co.
131-16 Rockaway Beach Blvd.
Rockaway Park, New York

Pursuant to request of Sheldon Lobel, Esq., 60-10 Roosevelt Avenue, Woodside, New York 11377, please be advised that:

Our records show that the basic transaction began with Kimball Construction Co., Inc. acquiring title to above-described premises by Contract of Sale from SISTERS OF REPARATION OF THE CONGREGATION OF MARY, INC. dated March 29, 1972 for the purchase price of $62,500.00.

Application was made to RICHMOND HILL SAVINGS BANK for simultaneous financing by $50,000.00 conventional purchase-money mortgage; the Bank's appraisal was based upon this being a 3-1/2 story detached multiple dwelling with a 1-car, built-in garage.

Layers Title Insurance Company title search showed premises to be classified in the Department of Buildings as a "HERETOFORE CONVERTED CLASS B ROOMING HOUSE (28 ROOMS). NO CERTIFICATE OF OCCUPANCY REQUIRED. NONE ISSUED."

The Bank's formal commitment was issued for $46,000.00 conventional purchase-money first mortgage, maturing in 1987.

When this owner made application for a $75,000.00 construction and permanent mortgage (by granting additional loan over the balance then due of $43,670.49) to finance proposed legal conversion from a Class B multiple dwelling to Class A multiple dwelling with 13 apartments, same was granted by Richmond Hill Savings Bank conditional upon procurement of legal Certificate of Occupancy and the required governmental certificates.

The Title Company reported in due course that the owners had duly completed the conversion and fully met the requirements of the Department of Buildings and had obtained Certificate of Occupancy dated March 13, 1974 No. Q18733 but at this stage the additional loan was suspended, until disposition of litigation which was then pending in the Supreme Court, by adjacent owners seeking to nullify the building permit, etc.

Mr. Kimball states that to reconvert the present building to the original condition would cost Eighty Thousand ($80,000.00) Dollars which would be unfeasible and would prove to be a financial disaster for him.

Our Bank, as mortgagee, is an innocent party which would also be irreparably damaged because it acted in good faith in making the original purchase-money mortgage loan. There was no notice at any time to contradict the record as to the status of the premises mortgaged to the Bank. Prior occupancy by the seller-religious order was in the nature of a senior citizen residence and semi-convent but NEVER a one-family dwelling!!

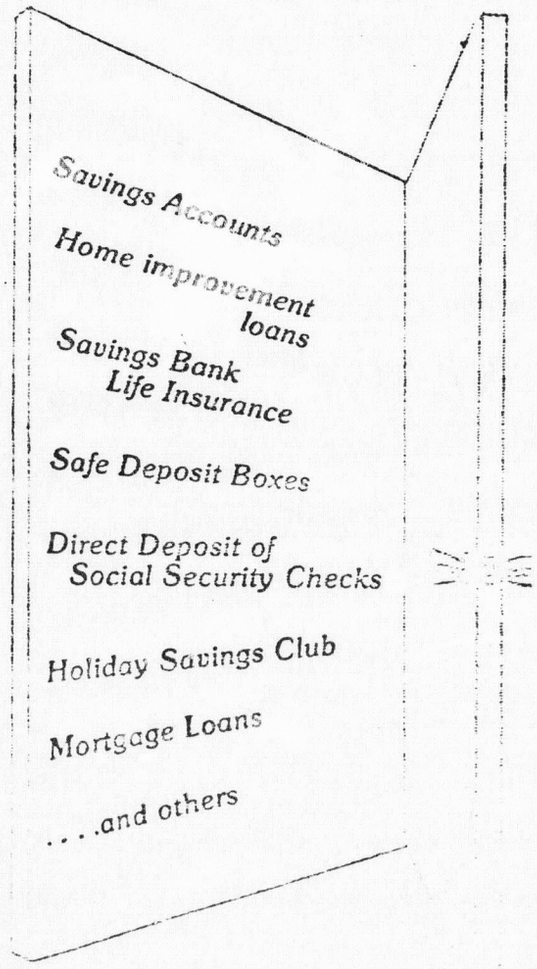
Our Bank was NEVER made party to any litigation!

Yours truly,

RICHMOND HILL SAVINGS BANK

s/ Richard L. Thomas
Richard L. Thomas
Vice-President

to important services



Richmond Hill Savings Bank

member FDIC

***MAIN OFFICE**
Jamaica Ave. at 116th St.,
Richmond Hill 11418
212/847-8100

LIBERTY AVENUE OFFICE
Liberty Ave. at 115th St.,
Richmond Hill 11419
212/843-6420

LEFFERTS BLVD. OFFICE
103-42 Lefferts Blvd. nr. Liberty Ave.,
Richmond Hill 11419
212/843-8200

***HILLSIDE AVENUE OFFICE**
Hillside Ave. at 257th St.,
Floral Park 11004
212/347-8600

In Nassau County:

***BALDWIN OFFICE**
1800 Grand Ave., Baldwin 11510
516/223-3300

***TULIP AVENUE OFFICE**
Tulip Ave. at Plainfield Ave.,
Floral Park 11001
516/437-4200

BANKING HOURS.
All Offices, Monday, Tuesday,
Wednesday and Friday;
9 am to 3 pm
Thursday; 9 am to 7 pm
Saturday; 9 am to 12 noon, except main office.

*Drive-in window

Statement of Condition

December 31st 1975

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Richmond Hill Savings Bank

member FDIC

PETITIONERS' EXHIBIT "9" - STATEMENTS OF CONDITION

121a

December 31, 1975

Statement of Condition

ASSETS

Cash in Vaults and Due from Banks	$ 9,844,950.36
U.S. Government Securities	12,240,051.63
Other Bonds, Notes and Debentures	72,904,535.90
Other Corporate Securities	22,183,757.04
Mortgage Loans on Real Estate	320,396,380.55
Other Loans	6,206,312.58
Investments in the Savings Banks Trust Company and Institutional Securities Corporation	225,100.00
Banking Houses and Furniture and Equipment	4,447,696.70
Other Real Estate	2,090,003.66
Interest Due and Accrued	4,394,216.72
Other Assets	3,706,713.80
TOTAL ASSETS	**$ 458,639,919.54**

LIABILITIES

Due Depositors	$ 416,847,301.75
Due Club Members	493,766.00
Other Liabilities	6,675,463.64
Deferred Income	3,411,560.73
Surplus and Reserves	31,211,827.41
TOTAL LIABILITIES AND SURPLUS	**$ 458,639,919.54**

Member Federal Deposit Insurance Corporation

December 31, 1975

Operating Earnings

Operating Income For: 1975	
Mortgages	$ 21,858,160.
Securities	6,756,437.
Other	2,619,043.
	$ 31,273,643.
Operating Expenses For: 1975	
Salaries & Benefits	$ 2,257,332.
Taxes	985,237.
Federal Deposit Insurance	178,050.
Other	1,858,795.
	$ 5,279,444.
Operating Earnings	$ 25,994,199.
Dividends and Interest to Depositors	$ 22,868,385.
Net Operating Earnings	$ 3,125,814.
Surplus & Reserves 1-1-75	$ 29,317,187.
Additions as above	3,125,814.
Net Non-Recurring Income (Profits & Losses on Sale of Assets, Recoveries & Charges)	(1,231,174.)
Surplus & Reserves 12-31-75	$ 31,211,827.

OFFICERS

Walter A. McDougal	*President*
Anthony Turzo	*Senior Vice President*
Joseph A. Bella	*Vice President and Treasurer*
Agnor Benson	*Vice President and Mortgage Officer*
Richard L. Thomas	*Vice President and Mortgage Officer*
Samuel E. Blythe	*Vice President and Secretary*
Perry G. Steen	*Vice President*
Edward K. Pitcher, Jr.	*Assistant Vice President and Comptroller*
Frederick H. Windhurst	*Assistant Vice President and Auditor*
Joseph F. Rufa	*Assistant Vice-President*
Herman S. Hoffmann	*Assistant Vice-President*
John A. McAuliffe	*Assistant Vice-President*
Frank H. Foertsch	*Assistant Vice President*
Joseph G. Andor	*Assistant Vice-President*
Robert J. Looney	*Assistant Vice-President*
Royal D. Tuck	*Assistant Secretary*
Frank A. Shaw, Jr.	*Assistant Secretary*
Ruth A. Ginocchio	*Assistant Secretary*
Nancy Craven	*Assistant Secretary*
Marion K. Kranz	*Assistant Secretary*
Anna Flynn	*Assistant Secretary*
Sally R. Smith	*Assistant Secretary*
Nora Maragos	*Assistant Secretary*

BOARD OF TRUSTEES

Arthur F. Beck	Walter A. McDougal
Brendan Byrne	James W. Rhodius
Clifford B. Campbell	Laurence J. Rice
Fred C. Eggerstedt, Jr.	Arthur M. Salisbury
Julius Granirer	Bert C. Schaefer
Hon. Henry J. Latham	Howard J. Schmahl
Joseph Linker, Jr.	*Clifton F. Thomas

Anthony Turzo

**Consultant*

ADVISORY COMMITTEE

Hermann J. Frecks
Chairman

John L. Batterman	Hon. Nicholas M. Pette
Joseph A. Bella	Armand T. Terpening
Agnor Benson	Richard L. Thomas
Joseph Licitra	Samuel E. Blythe, Secty

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GRANIRER & GRANIRER
COUNSELORS AT LAW
CHASE MANHATTAN BANK BUILDING
257 BEACH 116th STREET
ROCKAWAY PARK, N.Y. 11694
TELEPHONE 474-4800

February 25, 1975

MEMO TO: Kimball Construction Co.

RE: Anticipated Expenses on closing
$75.000.00 Conventional Mortgage
Premises: 131-16 Rockaway Beach Blvd.
Rockaway Park New York

Mortgage Tax	$930.00
Various Recording Expenses	28.50
Title Company bill	225.00
Survey Inspection	22.50
Legal Fee - Bank attorneys	475.00
Counsel fee for services to you	750.00
Total	$2 431.00

JULIUS GRANIRER

JG/th

P.S. Please note that there is no mortgage commitment outstanding at this time and that any application previously made for financing has expired and any renewal is subject to final determination by the Bank.

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EXCERPTS FROM THE ADMINISTRATIVE CODE AND CHARTER OF THE CITY OF NEW YORK RE JURISDICTION OF THE BOARD OF STANDARDS AND APPEALS

determination of the board, and the reasons therefor whenever it shall deem it practical to do so, and such other matters, including indices and digests, as the director may deem it advisable to publish.

c. At least ten days' notice of intention to adopt, amend or repeal any rule or regulation shall be given by publication in the bulletin of the board, and a public hearing shall be given before any action is taken thereon. The adopted rules and regulations and amendments and changes thereof shall take effect not less than twenty days after the publication thereof in the bulletin of the board. (*Derived from former* § 665 *as amended by L. L.* 1957, *No.* 94.)

CASE NOTES

¶ 1. Contention that Board of Standards and Appeals should have adopted rules with respect to the business of dry cleaning generally, as to definition of what is "dry cleaning" and as to general rules governing the term "accessory", were matters presently not properly before the court, as § 665 of the Charter provides for adoption of rules by the Board after giving of notice and the holding of a public hearing—In re Kent Stores, Inc. (Murdock), 123 (41) N. Y. L. J. (3-2-50) 766, Col. 3 F.

§ 666. **Jurisdiction.**—The board shall have power:

1. To require the testing and to approve materials and appliances to be used pursuant to law.

2. To make, amend and repeal rules and regulations for carrying into effect the provisions of the laws, resolutions, rules and regulations in respect to any subject-matter, jurisdiction whereof is conferred by law upon the board, and to include in such rules and regulations provisions applying to specific conditions and prescribing means and methods of practice to effectuate such provisions and for carrying into effect the powers of the board.

3. To make, amend and repeal rules and regulations for the enforcement of those provisions of the labor law and other laws which relate to the construction, alteration, structural changes in, plumbing and drainage of, elevators in, fire escapes on, adequacy and means of exit from and fire protection in all buildings within the city, which shall take the place of the industrial code and of any rules and regulations of the department of labor of the state of New York relating to the same subject-matter.

3-a. To make, amend and repeal rules, regulations and directives governing the preparation and presentation by the director of matters before the board.

4. To exercise exclusively with respect to buildings situated within the city, the same powers as are exercised by the department of labor of the state of New York elsewhere in the state.

5. To determine and vary the application of the building zone resolution as may be provided in such resolution.

6. To hear and decide appeals from and review

(a) except as otherwise provided by law, any order, requirement, decision or determination of the commissioner of build-

Plaintiffs' Exhibit 22

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ings or any borough superintendent of buildings acting under a written delegation of power from the commissioner of buildings filed in accordance with the provisions of subdivision four of section eighteen hundred four of the charter or,

(b) any order, requirement, decision or determination of the fire commissioner or any rule or regulation or amendment or repeal thereof made by the fire commissioner or,

(c) any order, requirement, decision or determination of the administrator of transportation or the administrator of economic development made in relation to the structures or uses on water front property under his jurisdiction in connection with the application or enforcement of the provisions of the zoning resolution of the city of New York, the labor law and such other laws, rules and regulations as may govern the construction, alteration, maintenance, use, occupancy, safety, sanitary conditions, mechanical equipment and inspection of structures in the city,

under the authority conferred upon them by law, by reversing or affirming in whole or in part, or modifying the order, regulation, decision or determination appealed from, and to make such order, requirement, decision or determination as in its opinion ought to be made in the premises, and to that end shall have the power of the officer from whose ruling the appeal is taken, and of any officer under whose written delegation of power such ruling was made. (*Subdivision 6 amended by L. L.* 1962, *No.* 70, *January* 1; *L. L.* 1967, *No.* 58, *July* 28; *L. L.* 1968, *No.* 23, *April* 22; *L. L.* 1969, *No.* 74, *Dec.* 29.)

7. In passing upon appeals, to vary or modify any rule or regulation or the provisions of any law relating to the construction, use, structural changes, equipment, alteration or removal of buildings or structures, or vaults in sidewalks appurtenant thereto, where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the law, so that the spirit of the law shall be observed, public safety secured and substantial justice done, provided that the provisions of title D of chapter twenty-six of the administrative code and of any regulation or order issued under such title may be varied or modified only to the extent permitted by such title and only in the manner and subject to the conditions therein specified.

8. To review, upon motion of any member of the board, any rule, regulation, amendment or repeal thereof, and any order, requirement, decision or determination from which an appeal may be taken to the board under the provisions of this chapter or of any law, or of any rule, regulation or decision of the board; but no such review shall prejudice the rights of any person who has in good faith acted thereon before it is reversed or modified. The provisions of this chapter relating to appeals to the board shall be applicable to such review.

Plaintiff's Exhibit 22-a

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RULES OF PROCEDURE

ARTICLE VIII—MATERIALS, APPLIANCES AND METHODS OF CONSTRUCTION

1. No application for and approval of a material, appliance or method of construction shall be entertained unless it is filed on Form SA/SM, with all the data required.

ARTICLE IX—ADOPTION OF RULES

1. No application for the adoption or amendment to any of the rules of the Board shall be entertained unless the application is made in writing.

2. No proposed rule or regulation or amendment thereto, originating with the Board or submitted to the Board for adoption, shall be published in the Bulletin, until such publication is authorized by at least three (3) Commissioners.

3. No resolution of the Board of Standards and Appeals adopting or amending any rule or regulation under Section 666 of the Charter or any other law shall be adopted unless such proposed rule or regulation shall have been published in the Bulletin of the Board for at least ten days prior to a public hearing thereon. Three (3) affirmative votes of the Board shall be necessary for the adoption of such resolution. No such rule shall become effective until twenty (20) days after publication in the Bulletin.

ARTICLE X—ADOPTION OF OTHER RESOLUTIONS

1. Every resolution of the Board of Standards and Appeals suggesting changes or amendments to the law and every resolution not otherwise provided for, shall require at least three (3) affirmative votes for its adoption.

ARTICLE XI—INSPECTIONS

1. In any case in which the Board may deem it necessary, inspection of the premises in question may be ordered by the Board. Inspection in connection with zoning applications and administrative appeals shall be made by a Committee of not less than two (2) Commissioners and they shall report their findings to the Board at any executive session, prior to the public hearing at which the vote will be cast. The committee may include the Director and/or a staff engineer as designated by the Board. Any Commissioner of the Board shall be included in the Committee, upon his request.

ARTICLE XII—TESTS

1. The five (5) Commissioners of the Board shall constitute the Supervisory Committee on materials, appliances and methods of construction. In any case in which a test is required, the Director shall order such test of any material, appliance or method of construction. Such tests shall be conducted according to the rules adopted by the Board, or directives of the Supervisory Committee, and in accordance with the requirements of law for the use of such material, appliance or method of construction. Tests shall be conducted in the presence of such member of the engineering staff as the Director may designate. In lieu of the above, tests made of the material, appliance or method of construction, by a recognized standard testing laboratory, City or State department, may be acceptable, but the Board reserves the right to be represented at tests by a member of the Engineering Staff or Board or any other person designated by the Supervisory Committee. The complete report of such tests shall be made to the Board in writing.

2. All expenses, including laboratory and traveling expenses, of such tests shall be borne by the applicant and no cost of such tests shall be borne by the Board.

3. Three (3) affirmative votes of the Board shall be necessary for the approval of such material, appliance or method of construction.

ARTICLE XIII—EXTENSIONS

Applications for extension of time in which to obtain permit, complete the work and/or obtain a Certificate of Occupancy shall be filed not more than thirty (30) days prior to nor more than thirty (30) days subsequent to the expiration date.

Applications for extension of the term of variance or special permits shall be filed not more than one (1) year prior to nor more than thirty (30) days subsequent to the expiration date of each variance or special permit.

ARTICLE XIV—RECORDS

1. All applications and appeals shall be on the required forms, and all communications, reports, etc., relating thereto shall be on sheets approximately 8½ inches by 11 inches in size. Plans shall be on sheets 8½ inches by 11 inches or double thereof unless otherwise accepted by the Director. After final disposition, all applications and appeals and other papers appertaining thereto shall be suitably bound and indexed and filed numerically in cabinets. All applications and appeals, shall upon application to the clerk in charge, be accessible to the public at all reasonable hours.

2. All drawings shall be properly titled, numbered, dimensioned, dated, and otherwise shall conform with the instruction sheet. No drawings shall be accepted unless they bear the seal of a registered architect or licensed professional engineer.

ARTICLE XV—THE BULLETIN

1. The Bulletin of the Board of Standards and Appeals shall be published each week except during recess. It shall contain:

(1) Directory of the Board.
(2) Docket of cases filed since the last publication of the Bulletin.
(3) The Hearing Calendar.
(4) Notice of Hearing on proposed rules or the amendment of rules.
(5) An abstract of the minutes of each meeting, including a brief statement of the action in each case, with the roll call thereon and the full text of the resolutions adopted.
(6) Index of rules adopted.
(7) Such other information as may be of value to the public and within the scope of the work of the Board.

2. The preparation and editing of material for the Bulletin shall be in charge of such members of the staff as shall be designated by the Director.

3. The Bulletin of the Board of Standards and Appeals is the official publication of the Board in accordance with Section 665 of the New York City Charter. Notice of hearings published in such Bulletin constitutes required legal notice.

ARTICLE XVI—OFFICERS

1. The Chairman, or in his absence, the Vice Chairman shall preside at all sessions. The Chairman, or in his absence, the Vice Chairman, may designate another Commissioner of the Board to preside and perform the duties of the Chair at public sessions or hearings. If the Chairman and Vice Chairman are absent and a quorum is present, they shall choose a presiding officer from among their number.

2. The Chairman, subject to these rules, shall decide all points of order or procedure, at public hearings, unless otherwise directed by a majority of the Board in session at that time.

3. The Chairman shall, subject to these rules, designate the Commissioners of the Board to make inspections and, unless otherwise directed by the vote of three (3) Commissioners

RULES OF PROCEDURE

absentee added to the number of votes for the application would be equal to three, in which case the matter will be laid over for consideration and final determination.

2. With the consent of the Board, any applicant may withdraw his application or appeal at any time prior to determination thereon, but, if a motion has been made, and be pending, such motion shall have precedence.

3. No application or appeal which has been dismissed or denied can be considered again except on a motion adopted to reconsider the vote or to restore to the Calendar.

4. No request for a re-hearing will be granted unless substantial new evidence be submitted or an application be filed under a different provision of the law. If, on motion of a Commissioner, adopted by three affirmative votes, the request is granted, the case shall be put on the docket and calendared for rehearing.

In all cases the request for rehearing shall be in writing, reciting the reasons for the request, and shall be accompanied by the necessary data and diagrams. Such request shall be filed with the Director who shall set a date when the request for restoration to the Calendar shall be submitted to the Board, of which date the person making the request shall be notified.

5. The Board may, on the motion of any Commissioner, review any decision that it has made and may reverse or modify such decision, but no such review shall prejudice the rights of any person who has in good faith acted thereon before it is reversed or modified.

ARTICLE V—ZONING APPLICATIONS

1. No application for a variance or modification of the provisions of the Zoning Resolution shall be entertained by the Board except in a specific case, and from an order, requirement, decision or determination made by the Commissioner of Buildings or any Borough Superintendent of the Department of Buildings, on the ground that the proposed plan or use violates the Zoning Resolution, except when the Board has original jurisdiction.

2. No such application shall be entertained unless the application is filed within thirty (30) days from the date of the action of the Commissioner of Buildings or any Borough Superintendent of the Department of Buildings.

3. Every application shall be made on Form BZ and shall be accompanied by all the data required by such forms, and shall be considered subject to such rules as the Board has adopted or may adopt under the Zoning Resolution.

4. As soon as any application is completed by the filing of the data required in Form BZ and payment of the prescribed fee, the case shall receive a calendar number. After a review of the application by the Examiner, the applicant shall be notified by the Director on Form 6CC of the date set for the Public Hearing, which shall be at least thirty (30) days after the mailing of said notice. Simultaneously, the Director shall notify the Chairman of the local Community Board which has jurisdiction within the area affected by the application. With this notice, the applicant shall be supplied with an official copy of Form 7NO, which he is required to send by certified mail or by personal service not less than twenty (20) days prior to the date of such hearing to every property owner entitled to notice of the application and to the Chairman of the local Community Board which has jurisdiction within the area affected by the application. The area of notification to affected property owners shall be defined as a radius of 400 feet from the center of the lot which is the subject matter of the application, except that for one, two and three family dwellings and for applications on lots which the frontage is forty (40) feet or less, the area of notification to the affected property owners shall be defined as a radius of 200 feet from the center of the lot. In addition, the applicant shall publish the contents of Form 7NO, or such notice as may be approved by the Secretary of the Board, at his or her own expense in one newspaper of local circulation or one newspaper of general circulation. The publication of this notice shall take place in such newspaper on one day of each week for two (2) successive weeks prior to the Public Hearing. The Secretary, or such staff member as the Chairman shall designate, shall notify the applicant in a [illegible] accompany Form 6CC in which newspaper the publication place the notice to be published. Five (5) days [illegible] hearing date, the applicant shall file a verified statement that he has so notified each property owner and the Chairman of the local Community Board either by personal service or by certified mail and the applicant shall file a copy of the published Notice with appropriate proof of publication. Not less than fourteen (14) days notice of the said hearing shall be given publication in the Bulletin of the Board.

5. On the date set for the Public Hearing, the applicant, owner, his architect, engineer, agent or attorney shall state his case; then the opposition shall be heard, and both shall have an opportunity for rebuttal.

6. Any application that has been denied after a Public Hearing cannot be reheard except on new material facts or under a different section of the Zoning Resolution.

7. All persons directly and substantially affected by an application and who reside, lease or own real property within a radius of 400 feet of the center of the lot of the subject matter of an application, except that for one, two, and three family dwellings the affected area shall be defined as within 200 feet of the center of the lot, may appear at the Public Hearing and voice their objections or approval in person or by agent or attorney. In lieu of an appearance in person or by an agent or attorney, such persons may file their views in writing. Briefs will be accepted only if filed at least five (5) days before the Public Hearing. All persons other than property owners, directly and substantially affected by an application or described herein who wish to be heard at a Public Hearing on the subject of the application shall on or before the time of commencement of said public hearing submit an affidavit attesting to their name, address and length of duration at said premises. Those persons as described above unable to appear in person but wishing to express a position in favor of or in opposition to an application may submit a similar affidavit in writing at least five (5) days before the Public Hearing.

ARTICLE VI—APPEALS

1. No appeal from any order, requirement, decision or determination of the Commissioner of Buildings, or any Borough Superintendent of the Department of Buildings or the Fire Commissioner or from any rule or regulation relating to the construction, alteration, demolition, structural changes, equipment, occupancy or use of any building or structure or premises under the Charter or the General City Law or any other law under which the Board has jurisdiction shall be entertained unless such appeal is filed on Form A with all the data required in such form, within thirty (30) days from the date of the order, requirement, decision or determination, appealed from, except that minor appeals from orders or decisions may be filed on Form A accompanied by a written description of the premises and a copy of the order or decision. What constitutes minor appeals from orders or decisions shall be determined by the Director.

ARTICLE VII—LABOR LAW VARIANCES

1. No application for a variance of the Labor Law, or of any rule adopted thereunder, affecting the demolition, construction or alteration of buildings, exits therefrom, the installation of fixtures or apparatus, as authorized by Section 666 of Chapter 27 of the New York City Charter, shall be entertained unless it is made on Form A, with all the data required on such form within thirty (30) days of the date of the administrative order.

Plaintiffs' Exhibit 23

RHM Form SR 1-37M 70-[illegible]
(Rev. 11/71)

1478

Kimball Const

THE CITY OF NEW YORK
HOUSING AND DEVELOPMENT ADMINISTRATION
DEPARTMENT OF RENT AND HOUSING MAINTENANCE

MANHATTAN
MUNICIPAL BUILDING
NEW YORK, N. Y. 10007
BRONX
1932 ARTHUR AVENUE
BRONX, N. Y. 10457
BROOKLYN
MUNICIPAL BUILDING
BROOKLYN, N. Y. 11201
QUEENS
126-06 QUEENS BLVD
KEW GARDENS, N. Y. 11415
RICHMOND
BOROUGH HALL
ST. GEORGE, N. Y. 10301

Kimball Construction

Date: Nov. 16, 1973

First American Title Ins. Co.
92-32 Union Hall St.
Jamaica, N.Y. 11433

Date Requested: 11/13/73

Your Reference: Title # 32,620 Q73

Our Reference: Search Clerk

REPORT OF SEARCH

Premises 131-16 Rockaway Beach Blvd. Search # 254103

A search of the records of this department reveals that the following violations are pending. Copies of the violations, if any, are enclosed.

Building Department, Violation Numbers: Date of Search 11/14/73

None

Rent and Housing Maintenance Dept., Violation Item Numbers: Date of Search 11/16/73

Item 23

EMERGENCY REPAIR MONEY DUE ON THIS BUILDING

DATE	AMT.

Classification (if requested) Heretofore Converted Class "B"

Occupancy

Other City Agencies (on Multiple Dwellings only): Date of Search 11/16/73

None

IMPORTANT NOTICE ABOUT SEARCH INFORMATION ABOVE

Departmental Violations and Classification:

Nature of Report: The above information is based solely on the records of the department on the search date indicated. [illegible] of the premises was involved in this search. There may be violations or changes in classification or occupancy [illegible] department has no knowledge and therefore do not appear in the record. Such violations or changes in classification or occupancy can be [illegible] properly authorized search inspection upon payment of the prescribed fee.

Construction in Progress: Furthermore, this search does not include information regarding any violations or changes [illegible] may be involved in connection with any alteration or other application which is on [illegible] and which has not been fully completed.

Other City Agency Violations or Other Corrective Orders (on Multiple Dwellings only)

Information is received from the Fire Department, Department of Health, Department of Air Pollution Control, [illegible] Department of Water Supply, Gas & Electricity. This may not represent all outstanding violations or other corrective orders [illegible] search since other agencies may take 72 hours in reporting and the additional time spent in receiving and recording [illegible] must also be considered.

John T. [illegible]
Chief Inspector

CHIEF INSPECTOR, OFFICE OF CHIEF INSPECTOR

[illegible] OF POSTING

By: [illegible]

RHM Form SR 1-15-1 70M347(70)
(Rev. 3/70)

128a

THE CITY OF NEW YORK
HOUSING AND DEVELOPMENT ADMINISTRATION
DEPARTMENT OF RENT AND HOUSING MAINTENANCE

MANHATTAN
MUNICIPAL BUILDING
NEW YORK, N. Y. 10007
BRONX
1932 ARTHUR AVENUE
BRONX, N. Y. 10457
BROOKLYN
MUNICIPAL BUILDING
BROOKLYN, N. Y. 11201
QUEENS
120-55 QUEENS BLVD.
KEW GARDENS, N. Y. 11424
RICHMOND
BOROUGH HALL
ST. GEORGE, N. Y. 10301

Attorneys' Abstract Inc.,
92-32 Union Hall Street
Jamaica, N. Y. 11433

Date: 5-17-72

Date Requested: 4-27-72

Your Reference: Title # [illegible]

Our Reference: Search Clerk [illegible]

REPORT OF SEARCH

Premises 131-16 Rockaway Beach Blvd. Search # [illegible]

A search of the records of this department reveals that the following violations are pending. Copies of the [illegible], if any, are enclosed.

Building Department, Violation Numbers: Date of Search 4-28-72

NONE

Rent and Housing Maintenance Dept., Violation Item Numbers: Date of Search 5-22-72

NONE

EMERGENCY REPAIR FORCE
DUE ON THIS PREMISES
DATE [illegible]

Classification (if requested) Heretofore converted Class B

Occupancy Rooming House

Other City Agencies (on Multiple Dwellings only): Date of Search 5-22-72

NONE

IMPORTANT NOTICE ABOUT SEARCH INFORMATION ABOVE

Departmental Violations and Classification:

Nature of Records: The above information is based solely on the records of the department on the search date noted. Notification of the pendency of violations is entered on this record. There may be violations or changes in classification not yet entered on the department records, which therefore do not appear in the record. Such violations or classification may be determined only by an inspection. A search of inspection upon payment of the prescribed fee.

Construction Progress: [illegible] however, this search does not include information regarding any violations or orders or notices of violations issued in connection with any alteration or other application which has not been finally approved and which is not finally completed.

Other City Agency Violations or Other Corrective Orders (on Multiple Dwellings only):

Information furnished from the records of the Fire Department, Department of Buildings, Department of Health, Department of Water Supply, Gas & Electricity. This may not represent all outstanding violations or orders of these agencies and due to the lapse of time between reporting and the ability to search the records, additional violations may have been entered.

CITY REGISTER

By

ABERLIN

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 9 day of June 1977 deponent served the within Appendix upon

Hon. W. Bernard Richland, Corp. Counsel
Hon. Louis J. Lefkowitz, Atty. Gen.
Sheldon Lobel, Esq. and
Frey & Harkow, Esqs.

attorney(s) for
Appellees

in this action, at
Municipal Building, NYC
2 World Trade Center, NYC 10047
60-10 Roosevelt Ave., Woodside, NY 11377 and
90-04 161st St., Jamaica, NY 11432

the address(es) designated by said attorney(s) for that purpose by depositing 4 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 9 day
of June, 1977

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978